Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES S. OWSLEY, et al.,
Petitioners,

v.

SAN ANTONIO INDEPENDENT
SCHOOL DISTRICT,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err by holding that an agency's interpretation of its own regulations is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, and *Bowles v. Seminole Rock & Sand Co.* simply because the agency's interpretation is set forth in an opinion letter that has not been subjected to notice and comment procedures under § 553 of the Administrative Procedure Act?

2. Did the Court of Appeals incorrectly abandon the established requirement of a specialized degree in its professional exemption analysis under 29 C.F.R. § 541.3 (Fair Labor Standards Act Regulations)?

PARTIES TO THE PROCEEDING

Petitioners

Charles S. Owsley, Rex. L. Hartwig, Juan J. Leal, Jerry R. Luce, Paul Mark Snodgrass, Raymond Ramirez, Charles A. Trevino, and Michael Leland Post. Petitioners are individuals and have no corporate affiliations.

Respondent

San Antonio Independent School District.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 187 F.3d 521 (5th Cir.1999). A copy of the Opinion is included as Appendix A at 1a-14a. The Opinions of the District Court for the Western District of Texas-San Antonio Division are not published and are included in Appendix B at 15a-26a and Appendix C at 27a-36a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its Opinion on September 13, 1999. Petitioners timely filed a Petition for Rehearing and Petition for Rehearing En Banc, both of which the United States Court of Appeals denied on October 18, 1999. (Appendix D at 37a-39a.) This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254 and 2106.

STATUTES, REGULATIONS AND AGENCY INTERPRETATIONS INVOLVED

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Appendix I

Administrative Procedure Act 5 U.S.C. § 551 and 553

STATEMENT OF THE CASE

This case involves the determination of whether high school athletic trainers are "professionals", exempt from overtime rights under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq. The original basis for federal jurisdiction in the federal district court for the Western District of Texas was 28 U.S.C. § 1331.

Petitioners, eight of the nine athletic trainers of the San Antonio Independent School District (SAISD), sued SAISD in 1996 for overtime benefits under the FLSA. SAISD asserted that all the trainers should be found to be employed in a professional capacity and thus exempt from FLSA rights.

The United States Department of Labor (DOL), under express congressional direction to do so, (29 U.S.C. §213(a)(1), Appendix E, p. 43a) has "defined and

delimited" the professional and other exemptions in regulations and accompanying interpretations published at 29 C.F.R. Part 541. (Appendix F) The governing regulation, §541.3, provides a two-part "short test" which SAISD must meet to establish that Petitioners' work is "professional" and thus not compensable by payment of time-and-a-half for hours worked over 40 in a week.

Under the short test, employees are exempt professionals if: 1) their primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes *and* 2) their work requires the consistent exercise of discretion and judgment in its performance.

The stipulated and undisputed summary judgment evidence established the following pertinent facts:

As high school athletic trainers, petitioners administer routine injury treatments, according to standard guidelines, such as the application of heat and ice, whirlpool, protective taping, bracing and splinting; monitor practices and games for all 14 sports in the respective high schools, including travel to "away" games; keep records; process school district insurance paperwork for injured athletes; and maintain the training room. The trainers recognize injuries suffered by student athletes and assist in the immediate treatment of injuries and rehabilitation. They also assist students with setting up appointments with physicians. In case of the rare emergency, the trainer performs minimal first aid and calls emergency medical

service. (Affidavit of Athletic Trainers, PX B; Stipulation of Parties, DX 40).[1]

To become an athletic trainer, in Texas and SAISD, one must have a degree in any field; gain 1,800 hours of athletic training experience through a three-year apprenticeship; and acquire at least one course in five specific academic areas. One must also have certificates in first aid and cardiopulmonary resuscitation. (R. 83); Opinion, App. A. p. 6a.

The federal district court for the Western District of Texas granted summary judgment for seven of the eight Petitioners.[2] It found that they were not exempt professionals and were thus entitled to overtime. The district court, without referring to DOL Opinion Letters cited by and favorable to Petitioners, ruled that, although the trainers' work required knowledge of an advanced intellectual type, it did not require the consistent exercise of discretion and judgment, and thus the professional

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[1] In this Petition, the designation "DX" refers to a numbered Defendant's Exhibit to Defendant's Motion for Summary Judgment on liability issues; such Motion is found at R. 252-271. The designation "PX" refers to a lettered Plaintiffs' Exhibit to Plaintiffs' Motion for Partial Summary Judgment (R. 110-119), (PX A through PX M), and to Plaintiffs' Response to Defendant's Motion for Partial Summary Judgment. (R. 298-308), (PX N through PX T, found at R. 309 through R. 326).

[2] The district court granted summary judgment against Petitioner Hartwig, finding that SAISD had established that he was subject to the administrative exemption. Hartwig's appeal was rejected by the Fifth Circuit on the same grounds as was the claim of the other trainers. (App. A, p. 13a, n. 9.)

exemption did not apply. See Appendices B and C for the two opinions of the district court.

The Court of Appeals reversed and rendered judgment for SAISD finding that the trainers are exempt professionals as a matter of law. The Court of Appeals expressly refused to defer to DOL interpretations of its own regulation. The athletic trainers provided to the Court three DOL Opinion Letters, issued in 1968, 1993 and 1998 respectively, each of which found that athletic trainers were not exempt as "professionals" under the FLSA. The Court, finding that such letters were not entitled to *Chevron* deference, ignored two of the letters completely. The third letter it dismissed with an alleged distinction both offhand and factually inaccurate. Court of Appeals Opinion, App. A, p. 8a.

The three Opinion Letters are included in Appendix H. Both the 1968 and 1998 opinion letters focus on the "primary duties" of the athletic trainers which do not differ from those of Petitioners as described in the record. The letters conclude that such work does not involve the "consistent exercise of discretion and judgment" which is one of the necessary hallmarks of the professional exemption under 29 C.F.R. § 541.3. These two letters, although properly authenticated and argued, were not mentioned by the Court of Appeals in its opinion. Had the Court of Appeals deferred to the thorough reasoning of these letters, it would have affirmed the trial court's judgment in favor of the trainers.

The 1993 Opinion Letter (App. H, pp. 70a-74a) deals with the other prong of the professional exemption: trainers also do not fall under the exemption, according to the Secretary, because their work does not require

advanced intellectual and academic knowledge acquired by prolonged specialized study; rather their work requires "a general academic education and...an apprenticeship and...training in the performance of routine, mental, manual or physical processes." 29 C.F.R. § 541.3(a)(1). The athletic trainers described in the 1993 letter did not need advanced professional knowledge to perform their work, nor do the trainers before this Court. In both cases, the chief method to acquire athletic training skills was the required three-year apprenticeship. (The Court of Appeals committed a serious factual error in its reading of the 1993 DOL Opinion Letter by concluding that the trainers involved in the DOL scenario had fewer academic requirements than those in Texas (App. A, p. 8a); in fact the trainers described in the Opinion Letter were required to have "at least one course in seven specific areas" (App. H, p. 75a) versus five such courses in Texas. The defendant school district did not suggest otherwise in its briefing to the panel.)

Citing cases from the Sixth and Tenth Circuits, the Fifth Circuit held that

> [w]hile the trainers are correct that we should defer to the agency's interpretation of a statute, this only means that we should follow the guidelines set forth in §541.3. It does not mean that the Secretary's views on § 541.3 are always controlling. The case the trainers cite [*Auer v. Robbins*, 519 U.S. 452 (1997)] stands only for the uncontroversial proposition that agency interpretations of statutes should be given deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

> Opinion letters, which are issued without the formal notice and rulemaking procedures of the Administrative Procedure Act, do not receive the same kind of *Chevron* deference as do administrative regulations.

(App. A, p. 7a).

The Court of Appeals' ruling on the deference issue was crucial to its resolution of this case. The Court of Appeals did not deny that the interpretation of the "short test" under 29 C.F.R. § 541.3 would have been an appropriate issue for *Chevron* deference had the opinion letters upon which Petitioners relied met the requirement of notice and comment rulemaking imposed by the Fifth Circuit. *See* App. A, p. 7a. Had the Court of Appeals deferred to the agency's interpretations of either the "learned profession" prong or the "discretion and judgment" prong of the short test, it would have been compelled to find that Petitioners were entitled to overtime benefits under the FLSA and would have affirmed the judgment of the District Court.

ARGUMENT

I.

THE COURT OF APPEALS ERRED BY HOLDING THAT AN AGENCY'S INTERPRETATION (BY OPINION LETTER) OF ITS OWN REGULATION IS NOT ENTITLED TO DEFERENCE.

A. THE COURT OF APPEALS' DECISION IS CONTRARY TO DECISIONS OF THIS COURT.

The Court of Appeals held that "opinion letters, which are issued without the formal notice and rulemaking procedures of the Administrative Procedure Act, do not receive the same kind of *Chevron* deference as do administrative regulations." App. A, p. 7a. This fundamental distinction between agency interpretations issued through notice and comment procedures and those issued through less formal means represents the established position of the Fifth Circuit.[3] That position, however, is flatly inconsistent with numerous decisions by this Court according deference under *Chevron* to agency pronouncements issued without notice and comment under the APA.[4] The Court of Appeals' holding is likewise inconsistent with the settled rule, articulated in this Court's decision in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), according deference to an agency's interpretation of its own regulations.

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[3] *See, e.g.*, Fort Hood Barbers Ass'n v. Herman, 137 F.3d 302, 307 (5th Cir. 1998) (holding that the level of deference to agency rulemaking depends on "whether the regulation at issue is 'legislative' or 'interpretive' in nature").

[4] *See generally* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 987 (1992) (noting that both opinion letters and informal adjudications have been held entitled to *Chevron* deference).

1. The Court of Appeals' refusal to defer to agency materials not promulgated by notice and comment procedures is contrary to this Court's consistent practice under *Chevron* and *Seminole Rock*.

The *Chevron* doctrine clothes validly issued regulations, which reasonably comport with the authorizing statute, with the force of law. There is no question that the DOL's regulation here, 29 C.F.R. § 541.3, is the law governing the application of the professional exemption under the FLSA.

The confusion has arisen among the lower federal courts over whether *Chevron* extends to interpretive actions by the agencies as well as to legislative actions. Such interpretive actions include opinion letters, *amicus curiae* briefs, and other published guidelines and interpretations of regulations and statutes by administering agencies.

When the question has been clearly presented, however, this Court, if not always invoking *Chevron*, has not hesitated to apply the *Chevron* doctrine to such interpretive actions. In considering whether to defer to agency interpretations - both of the statutes they administer and the regulations they have previously promulgated - this Court has not differentiated between those interpretations promulgated through notice and comment procedures under § 553 of the Administrative Procedure Act and those interpretations promulgated by other means.[5] In *Auer v.*

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[5] This is particularly the case where, as here, the administering agency is interpreting its own regulations. E.g.,

Robbins, 519 U.S. 452 (1997), a unanimous Court ruled that the Secretary of Labor's interpretation of the salary-basis test, "a creature of the Secretary's own regulations", is "controlling" unless plainly erroneous or inconsistent with the regulations. 519 U.S. at 461. The fact that the Secretary's interpretation was presented informally in an *amicus* brief did not make it unworthy of *Chevron* deference, because there was "simply no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462.

Similarly, in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (*VALIC*), the Court reversed the Fifth Circuit for failure to defer to a letter ruling issued by a deputy to the Comptroller of the Currency. The letter ruling, which granted NationsBank's application for a subsidiary to act as an agent in the sale of annuities, interpreted the scope of "the business of banking" under the National Bank Act, 12 U.S.C. s 24 Seventh. Although the Court focused squarely on the process by which the agency had reached its

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Mullins Coal Co. v. Director, Office of Workers Compensation Programs, 484 U.S. 135, 159 (1987)(referring to "the normal deference accorded to an agency's interpretation of its own regulation."); *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 150 (1991)("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)(Forest Service interpretation of its own regulation was not plainly erroneous or inconsistent with the regulations and was thus controlling).

decision, *see* 513 U.S. at 263 (rejecting the argument that the tension between the NationsBank letter and an earlier letter ruling precluded deference to the subsequent pronouncement), no justice objected to extending Chevron deference to cover the opinion letter at issue.

Likewise, in *Pension Benefits Guaranty Corp. v. LTV Corp.*, 496 U.S. 633 (1990), this Court deferred to the Pension Benefits Guaranty Corp.'s interpretation of ERISA, despite the fact that the PBGC's interpretation was set forth solely in three different opinion letters. *See* 496 U.S. at 642 (describing the letters); *id.* at 647 (applying *Chevron*). The Court described *Chevron* as setting forth "the general principles to be applied when federal courts review an agency's interpretation of the statute it implements," *id.*, without qualifying those principles according to the particular procedures by which the agency promulgated the interpretation.

Other decisions have similarly deferred to agency interpretations issued without following "notice and comment" procedures under the APA.[6] Although this Court has not explicitly addressed the argument that notice and comment is a prerequisite for deference, any such categorical position is flatly inconsistent with this Court's practice.

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[6] *See, e.g., Honig v. Doe*, 484 U.S. 305, 326 n.8 (1988) (deferring to Dept. of Education policy letter); *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986)(Chevron deference to Commerce Department certification of national compliance with treaty obligations); *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986)(Chevron deference to FDA notices setting "tolerance levels").

2. The Court of Appeals' refusal to defer to agency materials other than legislative rules is inconsistent with the premises of *Seminole Rock* deference.

As noted above, this Court held in *Seminole Rock* that agency pronouncements interpreting regulations previously issued by the agency are entitled to deference. *See* 325 U.S. at 414. Although *Seminole Rock* was decided long before *Chevron*, subsequent decisions have made clear that the two forms of deference are based on similar rationales and have virtually identical consequences. *See e.g., Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir.1997)(comparing the two doctrines). If anything, *Seminole Rock* deference "is even *greater* than that granted an agency interpretation of a statute it is entrusted to administer." *Id.*; *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir.1994). The Fifth Circuit's decision in the present case would radically alter the set of instances in which *Seminole Rock* deference would be available. Under the Fifth Circuit's analysis, deference is available only if the agency's *interpretation* of a regulation - not just the initial regulation itself - has gone through the notice and comment procedure. App. A, p. 7a. Deference is accorded, that is, only to legislative rules or to interpretive rules that the agency has chosen to put through notice and comment despite the specific exemption from that requirement for interpretive rules of the APA. 5 U.S.C. § 553(b)(A), App. I, p. 83a. This obviates the entire point of interpretive rulings; a subsequent interpretation promulgated through notice and comment, after all, would have all the force of a *new* rule.

It is therefore not surprising that the case law under *Seminole Rock* typically involves agency interpretations that have *not* gone through the notice and comment proceedings necessary to issue a new legislative rule altogether. In *Seminole Rock* itself, for example, the agency interpretations of a previously-issued legislative rule to which the Court deferred were made available in an interpretive bulletin and a quarterly report by the agency to Congress. *See* 325 U.S. at 417. More recently, in *Shalala v. Guernsey Memorial Hospital*, 115 S.Ct. 1232 (1995), the Court deferred to the interpretation of a regulation contained in a manual issued by the agency. None of these interpretations had been subject to notice and comment proceedings; if they had been, the agency could simply have amended the substance of the regulation itself.

3. Scattered statements in this Court's opinions suggesting the deference issue remains unresolved create a continuing need for definitive resolution by this Court.

Although the Fifth Circuit's categorical denial of deference to any agency interpretation not promulgated through notice and comment is inconsistent with this Court's actual practice – as well as with the very point of deference under *Seminole Rock* – this Court has sometimes suggested that the deference issue remains open. In *Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152 (1993), for example, this Court construed a provision of ERISA without finding it necessary to defer to constructions of the statute embodied in advisory opinions issued by the Department of Labor and the IRS. "Because of the nature and limitations of these rulings," the Court said, "we

express no view as to whether they are or are not entitled to deference. The resolution of that issue is deferred to another day." *Id.* at 162 n.3. Similarly, in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 326 n.5 (1992), the Court went out of its way to note that the parties had not argued that agency opinion letters submitted in the case were subject to *Chevron* deference.

Both *Keystone* and *Nationwide* were decided prior to *Auer* and *VALIC*, in both of which later cases this Court treated informal agency interpretations as subject to deference under *Chevron* and *Seminole Rock*. Thus, *Auer* and *VALIC* most likely supersede any indication in the earlier cases that the deference issue remains open. Nonetheless, as we show in the next section, the lower courts have not treated this issue as definitively resolved, and considerable confusion remains despite *Auer* and *VALIC*. This confusion is likely to persist until this Court definitively and explicitly addresses the issue of deference to informal agency interpretations.

B. A SIGNIFICANT CONFLICT EXISTS AMONG THE CIRCUITS OVER DEFERENCE OWED TO AGENCY OPINION LETTERS AND OTHER INFORMAL AGENCY INTERPRETATIONS.

Despite the cases in which this Court has clearly deferred to informal agency interpretations of law, a deep split has developed among the federal courts of appeal on the issue. Surveying the circuit decisions, Chief Judge Richard Posner of the Seventh Circuit recently recognized that

> "The issue of the weight to be given under the *Chevron* doctrine to informal expressions of agencies' views is unresolved, see *Commissioner v. Keystone Consolidated Industries, Inc.* 508 U.S. 152, 162 n.3, 113 S.Ct. 2006, 124 L.Ed.2d 71, n.3 (1993) , and compare *Kilgore v. Outback Steakhouse of Florida, Inc.* 160 F.3d 294, 302 (6th Cir.1998), with *Morton Community Unit School District No. 709 v. J.M.*, 152 F.3d 583, 585 (7th Cir.1998), with *Herman v. NationsBank Trust Co.*, 126 F.3d 1354, 1363 (11th Cir.1997), though *Auer v. Robbins*, 519 U.S. 452, 462, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), indicates that some deference, at least, is to be paid to views set forth in an amicus curiae brief filed by an agency."[7]

Commonwealth Edison Co. v. Vega, 174 F.3d 870, 875 (7th Cir.1999). In light of this division, it is imperative for this Court expressly to address the question of the formality with which an agency must act before its views will be entitled to deference under *Chevron* and *Seminole Rock*.

The Third, Fourth, Eighth, Ninth and Eleventh Circuits have accorded *Chevron* deference to agency opinion letters: *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 692-93 (3rd Cir.1994) (holding that Labor Department

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[7] *See also* Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA*, 10 Admin. L. J. 179, 187 n.28 (1996) (commenting that the issue of *Chevron* deference to informal agency interpretations "is truly unresolved").

Opinion Letters are generally entitled to *Chevron* deference; citing *PBGC*, 496 U.S. at 646);[8] *Hicks v. Cantrell*, 803 F.2d 789, 791-794 (4th Cir.1986) (applying *Chevron* deference to Secretary of Labor's letter interpretation of Federal Supplemental Compensation Act of 1982); *Thorson v. Gemini, Inc.*, 123 F.3d 1140, 1141 (8th Cir.1997) (according *Chevron* deference to DOL Opinion Letter); *Frank v. McQuigg*, 950 F.2d 590, 595 (9th Cir.1991) (applying *Chevron* deference to DOL Opinion Letter); *Blessit v. Retirement Plan for Employees of Dixie Engineering Co.*, 848 F.2d 1164, 1168, 1172 (11th Cir.1988) (according *Chevron* deference to PBGC Opinion Letters). Judge Posner likewise has suggested for the Seventh Circuit that the formality with which interpretations are promulgated should not affect the deference they receive, *see Morton Community Unit Sch. Dist. No. 709 v. J.M.*, 152 F.3d 583, 585 (7th Cir.1998) ("The interpretations that the Department of Education places on its own regulation are entitled, of course, to some measure of judicial deference . . . even when expressed informally, in a letter or a brief."), but that circuit does not seem to have definitively resolved the issue. *See id.* at 585-86 (concluding that the opinion letters did not resolve the issue before the court); *Vega*, 174 F.3d at 875 (concluding that the statute at issue was clear).

The D.C. Circuit does not appear to have decided a case deferring to opinion letters specifically, but that circuit

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[8] *See also Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170, 181-82 (3rd Cir. 1995) (deferring to interpretive rules promulgated without notice and comment). Judge Nygaard's dissent in *Blackwell* discussed the conflicting caselaw at length. *See id.* at 190-94 (Nygaard, J., dissenting).

has clearly rejected the view that agency interpretations must have gone through notice and comment before they are entitled to deference under *Chevron* or *Seminole Rock*. *See, e.g., Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 584-88 (D.C. Cir.1997) (deferring to agency interpretation, embodied in technical manual, of prior regulation so long as the interpretation is not itself substantive and therefore subject to the notice and comment requirement); *National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir.1997) (deferring to agency litigation position, so long as it is the agency's actual and considered view); *United States v. Hubbell*, 167 F.3d 552, 557 (D.C. Cir. 1999) (noting that "the cases frequently find deference in such safeguard-deprived circumstances" without "procedures for critique and comment by outsiders"); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 922 (D.C. Cir.1991) ("[I]t is simply not the law of this circuit that an interpretive regulation does not receive the *Chevron* deference accorded a legislative regulation.").[9]

By contrast, the Fifth, Sixth, and Tenth Circuits have refused to give *Chevron* deference to agency opinion letters. *See Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521 (5th Cir.1999) (this case); *Kilgore v. Outback Steakhouse of Florida, Inc.*, 160 F.3d 294, 302-303 (6th Cir.1998) (refusing to accord *Chevron* deference to DOL

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[9] *See also Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir.1997) (applying *Chevron* analysis to agency interpretation embodied in opinion letters and amicus brief, but ultimately refusing to defer on the ground that the agency's interpretation was inconsistent with the underlying statute).

Opinion Letter interpreting tip pooling under the FLSA);[10] *Southern Ute Indian Tribe v. Amoco Production Co.*, 119 F.3d 816, 832-833 (10th Cir.1997),[11] reversed on other grounds, 119 S.Ct. 1719 (1999) (in lengthy discussion, withholding *Chevron* deference to any agency action other than legislative rules and agency adjudications). In addition, the First Circuit has stated that *Chevron* deference is properly withheld from informal interpretations of statutes by administering agencies, *see Massachusetts v. FDIC*, 102 F.3d 615, 621 (1st Cir.1996) ("Less formal interpretations . . . are not accorded full *Chevron* deference."), and the Federal Circuit has likewise refused to accord the full measure of *Chevron* deference to interpretive rules not subject to notice and comment procedures, *see Travelstead v. Derwinski*, 978 F.2d 1244, 1250 (Fed. Cir. 1992).

Finally, the Second Circuit has reached conflicting results. *Compare Skandalis v. Rowe*, 14 F.3d 173, 178-179 (2nd Cir.1994) (deferring under *Chevron* to an interpretation of the Medicaid Act expressed by the Secretary of Health and Human Services in an amicus brief), *with Motor Vehicles Mfrs. Assn. v. New York State Dept. of Environmental Conservation*, 17 F.3d 521, 535

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[10] *See also Kelley v. E.I. Dupont de Nemours & Co.*, 17 F.3d 836, 841-42 (6th Cir.1994) (drawing clear line between regulations promulgated through notice and comment, on the one hand, and policy statements and interpretive rulings, on the other, and according only a lesser degree of deference to the latter).

[11] *See also Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1026 (10th Cir.1993) (refusing to give full *Chevron* deference to opinion letters issued by the Wage and Hour Administrator under the FLSA).

(2nd Cir. 1994) (refusing to defer to agency views embodied in an advisory circular and an amicus brief).

As these cases demonstrate, the division in the courts of appeals is both broad and long-standing. Every circuit has weighed in on the formality with which an agency must act before *Chevron* deference is appropriate; many circuits have considered the issue repeatedly and at length. The issue is now ripe for resolution by this Court.

C. THE FIFTH CIRCUIT'S LIMITATION OF *SEMINOLE ROCK* TO RULES PROMULGATED THROUGH NOTICE AND COMMENT DISRUPTS THE FRAMEWORK OF RULEMAKING AND INTERPRETIVE AUTHORITY UNDER *CHEVRON* AND THE ADMINISTRATIVE PROCEDURE ACT.

The Fifth Circuit's decision not to defer in this case to the Labor Department's opinion letters construing its wage and hour regulations may be best explained by a desire to constrain the agency's ability to "make law" outside the notice and comment process. But this decision ignores the carefully-calibrated set of rules allocating and regulating substantive rulemaking and interpretive authority under *Chevron* and the APA. Those rules emphasize *substantive* limits as to what the agency can accomplish without following notice and comment procedures, but do not limit the agency's *interpretive* authority through such procedures. The Fifth Circuit's approach risks unbalancing this carefully-constructed edifice.

Under § 553(b) of the APA, notice and comment is required for all substantive or legislative rules. On the other hand, interpretive rules - which may include a wide variety of means by which the agency issues interpretations of preexisting regulations, including manuals, opinion letters, and the like – are specifically exempted from the notice and comment requirement. 5 U.S.C. § 553(b)(A), App. I, p. 83a. The distinction between interpretive and substantive rules is not always obvious, of course; in general, courts have looked "to whether the interpretation carries 'the force and effect of law,' . . . or rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe." *Paralyzed Veterans*, 117 F.3d at 588 (Quoting *American Mining Congress v. Mine Safety and Health Administration*, 995 F.2d 1106, 1109-10 (D.C. Cir.1993).

Once a substantive rule is in place, courts have recognized that a significant *change* in its interpretation may have important substantive consequences that require use of the notice and comment procedures. *See Paralyzed Veterans*, 117 F.3d at 586-87. Hence, changes in interpretation that amount to "repeals" or "amendments" are subject to notice and comment under APA § 551(5), App. I, p. 84a. *Id.* at 586. The critical point, however, is that notice and comment is an obligation that comes with *substantive* lawmaking by the agency; it applies only to the issuance of new rules or changes in the interpretation of existing rules that have sufficiently substantive effects to be termed a "repeal" or "amendment."

In this case, neither the School District nor the Fifth Circuit panel have ever argued that the opinion letters at issue are anything other than interpretive rulings. They impose no new obligations, and they do not change

previously-existing interpretations of the relevant regulations. As such, they are specifically exempted from notice and comment requirements under the APA. For the Fifth Circuit to nonetheless hold that such interpretations are robbed of their authoritative force unless notice and comment procedures are followed, stands the APA's carefully-constructed regime on its head. For this reason, the D.C. Circuit recently rejected the principle that an agency's interpretation of its own regulations should not be accorded deference where the interpretation is made without notice and comment. *See United States v. Hubbell*, 167 F.3d 552, 557 (D.C. Cir.1999)(noting that "the cases frequently find deference in such safeguard-deprived circumstances").

The Fifth Circuit's drastic limitation of deference would undermine the regime established by *Chevron* and the APA in several important ways.

First, both *Chevron* and *Seminole Rock* deference are driven by Congress's delegation of interpretive authority to the agency.[12] Courts have respected this delegation based on a recognition that the agency is more politically accountable, and therefore better able to make the policy choices that interpretation inevitably involves. In the *Seminole Rock* context, moreover, deference recognizes that the agency that drafted a regulation is in a superior

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[12] *See Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151 (1991)("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers.").

position to understand and explain the regulatory text.[13] The Fifth Circuit's decision, however, largely defeats this delegation by withdrawing deference from most agency interpretive actions and reserving the final say to an unaccountable federal court.

Second, *Chevron* and *Seminole Rock* also rest on more pragmatic concerns for uniformity of interpretation. *See Hubbell*, 167 F.3d at 559 (noting that "it is far easier for an agency to develop and maintain a coherent interpretive line if its legal interpretations enjoy deference from the scattered multitude of judges who review its decisions"). The Fifth Circuit's rule makes it more difficult for agencies to maintain uniformity by reserving deference for a minute fraction of the agency's interpretive work product.

Third, the Fifth Circuit's rule contravenes the settled principle of administrative law that federal courts are not free to impose new procedural hurdles on agency action that Congress did not see fit to require in the Administrative Procedure Act. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Pension Benefit Guaranty Corp.*, 496 U.S. at 654 ("*Vermont Yankee* stands for the general proposition that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA."). While the Fifth Circuit has not *required* agencies to engage in notice and comment procedures for all interpretive rulings, that court *has* chosen to withhold one of the most critical aspects of an

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[13] *See, e.g.*, 1 Kenneth C. Davis & Richard J. Pierce, Administrative Law Treatise § 6.10, at 282 (3d ed. 1994).

agency's interpretive authority - the deference accorded under *Chevron* and *Seminole Rock* - if the agency does not observe such procedures. Such a requirement is both unauthorized and unnecessary, because the APA carefully cabins agency discretion to act outside the notice and comment process in other ways.

II.

THE COURT OF APPEALS INCORRECTLY ABANDONED THE ESTABLISHED REQUIREMENT OF A SPECIALIZED DEGREE IN ITS PROFESSIONAL EXEMPTION ANALYSIS

The Fifth Circuit held that the "only" deference owed to the agency's interpretation of the professional exemption was that "we should follow the guidelines set forth in § 541.3", the regulation itself. (App. A, p. 7a). This analysis considers the agency's long-standing and thorough "Interpretations" published in 29 C.F.R. § 541, Part B (see Appendix F) and the opinion letters as "persuasive" but never controlling in deciding the issue.

As a consequence of the Court of Appeals' non-deferential approach to DOL interpretations of the question before the Court, it improperly abandoned the requirement, set forth in the Interpretations at § 541.301 (App. F, p. 58a-60a) and recognized in other circuits, that an exempt "professional" employee under the FLSA must generally have earned a specialized degree.

Here the Court concluded that the trainers' fifteen required credit-hours in five specific area courses (only one of which was actually in athletic training), were sufficient to constitute "a prolonged course of specialized intellectual

instruction and study", and further implicitly concluded that such courses were necessary to performance of the trainers' work.

In contrast, the Secretary of Labor concluded in the 1993 Opinion Letter, based on substantially identical certification requirements, [14]that, without a specialized academic degree, the trainers were not within the scope of the professional exemption: "Given the predominantly generalized education and experience/apprenticeship requirements for certification and for performance of work as an athletic trainer, we are unable to conclude that they are performing work that requires advanced knowledge acquired by prolonged academic instruction in a recognized field of science or learning." 1993 Opinion Letter, App. H pp. 75a-76a.

The 1993 DOL Opinion Letter cites and incorporates the circuit court opinion in *Dybach v. Florida Department of Corrections*, 942 F.2d 1562 (11th Cir.1991), which held certain state probation officers to be non-exempt. In *Dybach*, with the help of a requested *amicus curiae* brief from the Secretary of Labor, the Eleventh Circuit held that before the professional exemption can apply to a position, "the duties of that position must call for a person who is in a learned profession with at least a college degree in a specialized type of learning." *Id.* at

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[14] The Texas trainers needed 5 related courses and 1,800 hours (3 years) of apprenticeship for certification; the trainers described in the 1993 Opinion Letter needed 7 related courses and 1,500 hours of apprenticeship. Thus, the trainers described in the opinion letter had *more* specialized education and *less* apprenticeship, and were still found non-exempt.

1565. A college degree "in any field", as is required for Petitioners' position, was held not to meet the FLSA requirement.

Similarly, in *Fife v. Harmon*, 171 F.3d 1173 (8th Cir.1999), the Court held that Airfield Operation Specialists were not exempt "professionals" where the minimum qualifications for the position were "a Bachelor's degree in aviation management or a directly related field, or four years of full-time experience in aviation administration or an equivalent combination of experience and education." The Court followed the DOL's reasoning in 29 C.F.R. § 541.301 in holding that the position required advanced knowledge "'from a general academic education and from an apprenticeship,' not from 'a prolonged course of specialized intellectual instruction'", *Id.* at 1176-77, and that thus the employees were not "professionals".

In its analysis of the "education" prong of the professional exemption, the Fifth Circuit relied on *Paul v. Petroleum Equipment Tools Co.*, 708 F.2d 168 (5th Cir.1983). *Paul* held that a company airplane pilot was properly found to be an exempt professional employee. The court of appeals affirmed the district court's finding that the instruction and training received by a pilot necessary to obtain the required FAA certificate, as demonstrated in the FAA's official testing manuals, constitutes the functional equivalent of the advanced degree necessary for a professional.

Paul is easily distinguished from Petitioners' case, including the fact that the Labor Department had consistently taken a "no action" position on the exempt status of company pilots, and that the court of appeals expressly limited the case to its facts. 708 F.2d at 174.

Moreover, in the Brief for the Secretary of Labor as Amicus Curiae in *Dybach*, supra, (excerpts included as App. G, pp. 66a - 68a), the Secretary discussed the holding in *Paul*: "The regulations state . . . that it is not sufficient to be a highly skilled technician. . . . . The regulations also speak in terms of 'intellectual' instruction. On that basis, the *Paul* decision is simply incorrect."

The Fifth Circuit's lax approach to the requirement of an advanced professional education for the professional exemption is in conflict with the analyses of *Dybach* and *Fife*, and is in conflict with the consistent views of the Secretary of Labor, who defined the professional exemption and must enforce it.[15] The 1993 DOL opinion letter on athletic trainers states that ". . . the Wage and Hour Administrator has on many occasions held that work which can be performed without a degree in a specialized field of intellectual study cannot be exempt work ." App. H p. 75a. There is simply no reason to believe that this opinion

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[15] A glance at the recent reported opinion letters of the Wage and Hour Administrator will affirm the DOL's typical formulation of the test: "A . . . prolonged course of...study has generally been held to include only those employees who have acquired at least a baccalaureate degree or its equivalent which includes an intellectual discipline in a particular course of study as opposed to a general academic course otherwise required for a baccalaureate degree." Op. WH 2034, Lab.L.Rep. (CCH) par. 32, 867 (June 30, 1997) (Licensed Veterinary Technicians not exempt professionals); Requiring ". . . at least a baccalaureate degree or its equivalent which includes a longer intellectual discipline in a particular course of study as distinguished from a general academic course otherwise required for a baccalaureate degree." Op. WH 1915, Lab.L.Rep. (CCH) par. 32, 744 (March 20, 1998) (paralegals not exempt professions.).]

does not represent the Secretary's fair and considered judgment on this issue. *Auer v. Robbins*, 519 U.S. at 462.

To prevent further undermining of the enforcement of the FLSA, this Court should confirm the generally accepted standard for analysis of the "education" prong.

CONCLUSION

The Court should grant certiorari: 1) to clarify for the deeply divided federal circuits the deference due agency interpretations of their own regulations and similar authorized agency actions not subject to the rulemaking procedures of the APA; and 2) to reaffirm the established requirement of a specialized degree in determining applicability of the professional exemption in FLSA cases. Petitioners ask the Court to reverse the decision of the Court of Appeals and to render judgment for them on the professional exemption issue; and to remand to the Court of Appeals for determination of unresolved issues.

Respectfully submitted,

/s/_____

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed September 13, 1999]

No. 98-50743

CHARLES S. OWSLEY; REX L. HARTWIG; JUAN J. LEAL; JERRY R. LUCE; PAUL MARK SNODGRASS; RAYMOND RAMIREZ; CHARLES A. TREVINO; MICHAEL LELAND POST,
Plaintiffs-Appellees-Cross-Appellants,

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the Western District of Texas

Before JOLLY and SMITH, Circuit Judges,
and VANCE, District Judge,*

JERRY E. SMITH, Circuit Judge:

The San Antonio Independent School District ("SAISD") appeals a summary judgment in this action brought pursuant to the Fair Labor Standards Act ("FLSA") awarding over-time benefits to a group of athletic trainers. Concluding that the trainers are professionals exempt from the FLSA's overtime benefits requirements, we reverse and render summary judgment in favor of SAISD.

I.

The plaintiffs are eight of the nine athletic trainers of SAISD. Trainers work with coaches and high school and middle school athletes to prevent injuries and to rehabilitate athletes from injuries. Their job responsibilities include attending practices and sporting events, maintaining treatment facilities, and working with students undergoing rehabilitation. On average, they work sixty hours a week.

The FLSA, 29 U.S.C. § 201 *et seq.*, requires employers to pay overtime for hours worked in excess of forty in a given work week, but it exempts employees employed in *a bona fide* professional, administrative, or executive capacity. 29 U.S.C. § 213(a)(1). SAISD claims the trainers are subject to this exemption.

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* District Judge of the Eastern District of Louisiana, sitting by designation.

II.

The district court granted the trainers' motion for summary judgment in part, declaring they are not exempted professionals under the FLSA. It refused, however, to award liquidated damages, because SAISD had a good faith and reasonable belief that the trainers were exempt. *See* 29 U.S.C. § 260. The court granted SAISD's summary judgment motion in part, finding that one of the trainers, Rex Hartwig, was employed in an administrative capacity exempt from the provisions of the FLSA under 29 C.F.R. § 541.2.

SAISD appeals the summary judgment regarding the exemption. The trainers cross-appeal the holding that their job meets the "learned" prong of the short test, the summary judgment adverse to Hartwig, and the denial of liquidated damages.

III.

A.

We review a summary judgment *de novo,* employing the same standards as did the district court. *See Urbano v. Continental Airlines, Inc.,* 138 F.3d 204, 205 (5th Cir.), *cert. denied,* 119 S.Ct. 509 (1998). Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322-24 (1986); *see also* FED. R. CIV. P. 56(c). An issue is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2505, 2510 (1986).

The employer bears the burden of proving exempt status. *Paul v. Petroleum Equip. Tools Co.*, 708 F.2d 168, 169 (5th Cir. 1983). The employer's claim of exemption must be construed narrowly and in favor of the employee. *See Brennan v. Green's Propane Gas Serv., Inc.*, 479 F.2d 1027, 1032 (5th Cir. 1973)[1]

B.

Both parties agree that the applicable test for whether the plaintiffs qualify as professionals is the following "short test"[2] set forth in 29 C.F.R. § 541.3:

> The term employee employed in a bona fide. . . professional capacity. . . shall mean any employee:
>
> (a) Whose primary duty consists of the performance of:

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[1] SAISD urges us to review the legal determination of exempt status under the FLSA as a question of law while deferring to the district court's factual findings for clear error. *See Dalheim v. KDFW-TV*, 918 F.2d 1220, 1225-27 (5th Cir. 1990). The *Dalheim* court, however, was reviewing a judgment following a *bench trial, see id.* at 1224, while we are reviewing a summary judgment. Therefore, we review the judgment *de novo* and do not give the factual findings any deference.

[2] The parties stipulate that the plaintiffs earn more than $250 a week. Therefore, Department of Labor regulations instruct that the exemption status can be determined via the streamlined "short test" described in 29 C.F.R. §§ 541.3(e), .315. *See Paul*, 708 F.2d at 170.

> (1) Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes, . . . and
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> (b) Whose work requires the consistent exercise of discretion and judgment in its performance.

In ruling on the motions for summary judgment, the district court held that because of the requirement to take fifteen hours of specific college-level courses, the trainer position required learning customarily acquired through specialized intellectual instruction. With respect to the second prong, whether the work required consistent exercise of discretion and judgment, the court held that the trainers may make decisions only within a well-defined and regulated framework, and the application of their specialized knowledge is limited to enumerated pre-set situations. Therefore, it found that the trainers are not exempt professionals under the FLSA.

1.

Trainers in Texas must obtain a state license. State regulations provide a number of options to meet the

requirements to be a trainer, the most lenient of which is the following:[3]

> (1) a bachelor's degree in any field;
>
> (2) 1800 hours of apprenticeship over a three-year period;
>
> (3) completion of 5 3-hour credit college courses in (a) human anatomy; (b) health, disease, nutrition, fitness, wellness, or drug and alcohol education; (c) kinesiology; (d) human physiology or physiology of exercise; and (e) athletic training; and
>
> (4) a C.P.R. test.

25 TEX. ADMIN. CODE § 313.5. The district court found that, at a minimum, an SAISD athletic trainer must obtain education beyond a high school level and that the education requires a certain amount of specialization in human anatomy and physiology. These requirements are enough, the court held, to satisfy the "learned" prong.

On cross-appeal, the trainers challenge the finding in two ways. First, they submit an opinion letter from the Wage

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[3] The trainers concede that the other two educational prerequisites for SAISD athletic trainers, degrees in physical or corrective therapy, are more specialized than is the requirement of 15 credit hours, and they therefore focus on the most lenient requirements when discussing the "learned" prong.

and Hours Division of the Department of Labor stating that athletic trainers in Kansas do not meet the "learned" prong of the professional exemption. They then ask us to defer to this agency interpretation unless it is manifestly contrary to statute. The opinion letter, the trainers assert, represents an agency interpretation and requires us to hold the plaintiffs "non-exempt" under the "learned" prong.

While the trainers are correct that we should defer to the agency's interpretation of a statute, this only means that we should follow the guidelines set forth in § 541.3. It does not mean that the Secretary's views on § 541.3 are always controlling. The case the trainers cite[4] stands only for the uncontroversial proposition that agency interpretations of statutes should be given deference under *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Opinion letters, which are issued without the formal notice and role-making procedures of the Administrative Procedure Act, do not receive the same kind of *Chevron* deference as do administrative regulations.[5]

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[4] *Auer v. Robbins*, 519 U.S. 452 (1997).

[5] *See Kilgore v. Outback Steakhouse, Inc*, 160 F.3d 294, 302 (6th Cir. 1998); *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993) (refusing to give *Chevron* deference to Wage and Hour Administrator Opinion Letters). This does not mean that such opinion letters are to be completely disregarded. For instance, this court has held that opinion letters of an administrative agency, although less authoritative than regulations or formal decisions, are entitled to be "weighed carefully" and to "great deference" if they state a reasonable conclusion. *See Coca-Cola Co. v. Atchison, Topeka & Santa Fe*

We therefore consider the 1993 opinion letter as persuasive, but we have no obligation to defer to its interpretation, especially given that it does not even deal with the same facts as those in the case *sub judice*. The Kansas athletic trainers that were the subject of its opinion did not have a credit-hour requirement similar to the fifteen credit-hours required in Texas. Therefore, while the letter suggests that athletic trainers in general do not meet the learned prong, it does not account for the additional specialized training in the form of the credit-hours Texas requires. For this reason, the letter's analysis is inapposite.

In their second challenge, the trainers baldly conclude that a mere fifteen credit-hours cannot be compared to the advanced type of study required for professions such as law, medicine, and teaching that are specifically contemplated by the professional exemption. *See* 29 C.F.R. § 541.301(e)(1). We agree with the district court, however, that brevity of the trainers' course of specialized study does not preclude its inclusion under the "learned" prong. Unlike the case relied on by the trainers,[6] in which the claimants were not required to take any specific college courses to qualify for their job, the trainers must take a specified number of specialized courses directly related to their professional duties in sports medicine and athletic training.

The trainers' educational background is akin to the training requirements this court found sufficient to meet the

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Ry., 608 F.2d 213, 222 (5th Cir. 1978).

[6] *Dybach v. Florida Dep't of Corrections*, 942 F.2d 1562 (11th Cir. 1991).

"learned" prong for the airline pilots in *Paul.* There, we found the requirement that pilots complete a course of instruction to learn the regulations governing pilots, basic aerodynamic and flight principles, and numerous airplane operations was enough to satisfy the "learned" prong. *See Paul,* 708 F.2d at 172. Even though the pilots did not obtain a college degree, their "extensive knowledge of aerodynamics, airplane regulations, airplane operations, [and] instrument procedures" convinced us that their training was as complex as that of "nurses, accountants, and actuarial computants" who are regarded as employees in learned professions. *See id.* at 172-73.

Similarly, the trainers are required to obtain an university degree and to undergo specialized training in subjects such as human anatomy, physiology, and sports medicine. We therefore affirm the finding that the plaintiffs meet the "learned" prong of the professional exemption.

2.

To qualify the trainers for the professional exemption, SAISD must also show that the trainers' work "requires the consistent exercise of discretion and judgment in its performance." 29 C.F.R. § 541.3. Though the district court determined that the trainers satisfied the "learned" prong, it found that they did not ultimately qualify for the exemption, because their work does not require the exercise of discretion. The court based its ruling on two grounds, neither of which is persuasive.

First, the court found that the trainers work under the supervision of a physician. In making this determination, it relied on SAISD's job description, which states that trainers

"will. . . act under the supervision and the direction of the team physician."

We disagree, however, that the stipulated job description supports the judgment. Notwithstanding the "supervision and direction" language, the job description also indicates that the trainers exercise a substantial amount of discretion in the performance of their duties.

For instance, the trainers are expected to (1) establish specific procedures to be carried out by a coach and/or student trainer in the event of an emergency when care of an athlete is needed; (2) be responsible for communication with parents, physicians, coordinating trainer, and coaches concerning injured athletes; and (3) determine the athlete's return to practice or playing status, following an athletic injury. In listing these discretionary responsibilities, the job description does not make any reference to the supervising physician except to point out that a player's return after an injury may also be determined by a physician.[7]

The job description states that trainers "will *also* act under the supervision and the direction of the team physician" (emphasis added). This further supports our view that the trainers act independently to exercise their own judgment and discretion and that they sometimes act under the supervision

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[7] The job description adds this parenthetical comment: "Return *may also* be determined by a team physician." This language weighs against the district court's assumption that trainers act under the supervision of physicians at all times.

of a physician. Accordingly, the district's court's reliance on the job description does not support its ruling.

The court also decided that the trainers do not exercise discretion because they use "their advanced training and experience to make decisions. . . only within a well-defined framework." *See Hashop v. Rockwell Space Operations* Co., 867 F. Supp. 1287, 1298 (S.D. Tex. 1994). Examining a stipulation of the trainers' duties and responsibilities, the district court observed that over 45 of the 77 enumerated responsibilities set forth in the guidelines require the trainers to act under standard treatment guidelines. The court further noted that the remaining 30 or so responsibilities are routine acts that do not require the application of specialized knowledge or training.

Our review of this stipulation leads us to a different conclusion. While many of the trainers' duties are limited to actions within the "standard treatment guidelines," we agree with SAISD that reliance on such guidelines does not, by itself, indicate the lack of professional discretion and judgment. In the context of finding nurses to be exempt professionals, for example, one court has observed that "the fact that a standard remedy is prescribed for a designated injury or complaint does not detract from the analysis and training and skill necessary to determine the extent and seriousness, and often the type of injury or complaint, as well as what particular remedy should be given or applied." *Hofer v. Federal Cartridge Corp.*, 71 F. Supp. 243, 244-45 (D.C. Minn. 1947).

Several of the trainers' stipulated duties fit within *Hofer's* category of discretionary skills applied within a

standard framework. For example, trainers must (1) assess[] the extent of an injury based on standard treatment guidelines; (2) perform neurological evaluations by assessing consciousness, intellectual performance, sensation, and movement according to standard guidelines; and (3) determine whether the athlete continues to practice/play after an injury, based on well-established tests and criteria when a physician is not present. In exercising any of these duties, the trainer will have to apply his own skills and training to diagnose injuries or make judgments about an athlete's suitability for further action.

The trainers rely on *Quirk v. Baltimore County*, 895 F. Supp. 773 (D. Md. 1995), which held that emergency response paramedics do not exercise discretion and judgment, because they follow highly specific medical protocols. *Quirk* is distinguishable, because paramedics work on a daily basis with their supervising physicians under the expectation of physician intervention immediately following emergency treatment. In contrast, the trainers operate independently when they assess an athlete's injury and when they make decisions on whether the athlete should seek further medical attention, sit out the remainder of practice or a game, or continue athletic activity. There is no immediate expectation of physician intervention, and, as we have said, there is no evidence that the physicians supervise the trainers' activities at all times, or even most of the time.

The existence of standard procedures and guidelines does not mean that the trainers' responsibilities do not require the type of consistent exercise of independent discretion and judgment this court has found characteristic of other professionals. *In Paul*, 708 F.2d at 171, we found that pilots

exercised discretion and judgment in deciding whether to fly, selecting the safest route, and responding to unexpected airborne events, even though they also operated under extensive procedures and guidelines.

Like the pilots in *Paul,* the trainers must make decisions on whether an athlete must be sent to a hospital or can continue to participate in athletic events. The trainers aver that unlike the pilots, they do not have to make decisions "about problems to which there were often no recognized or established answers." *See id.* at 170. Trainers, however, must also respond to emergencies and make quick, independent judgments about how to deal with unexpected injuries.[8] These sorts of important and complex decisions, which require trainers independently to apply their experience and advanced training in human anatomy and medicine, satisfy the "discretion" prong. Therefore, we reverse the summary judgment granted to the trainers on this question.[9]

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[8] The trainers argue that in responding to emergencies, they simply follow standard procedures and call for emergency medical support. We are convinced, however, that even making this initial assessment of a potentially serious injury involves discretion and judgment in deciding, for instance, whether to move the athlete from the field and whether the injury is serious enough to merit EMS support. Emergency response paramedics have no such discretion.

[9] The trainers cross-appeal the partial summary judgment to SAISD declaring that Hartwig is exempt from overtime benefits as an "administrator," and the refusal to award prejudgment interest. Because we conclude that all the trainers (including Hartwig) are exempt from the FLSA's overtime benefits, we do not

IV.

Because the court erred in finding that the trainers did not exercise discretion and independent judgment, we REVERSE its partial summary judgment granted to the trainers. Our review of the record, which consists mostly of stipulated evidence not raising any disputes of material fact, also permits us to RENDER summary judgment in favor of SAISD, because it successfully has demonstrated that the trainers qualify for the professional exemption under the "learned" and "discretion" prongs of the FLSA's short test.

REVERSED AND RENDERED.

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reach Hartwig's cross-appeal or the trainers' cross-appeal for prejudgment interest.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF THE TEXAS SAN ANTONIO DIVISION

[Filed June 20, 1997]

No. SA-96-CA-0922

CHARLES S. OWSLEY, REX L. HARTWIG, JUAN J. LEAL, JERRY R. LUCE, PAUL MARK SNODGRASS, RAYMOND RAMIREZ, CHARLES A. TREVINO and MICHAEL LELAND POST, *Plaintiffs*,	)
v.	)
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *Defendant.*	)

ORDER GRANTING IN PART MOTION FOR PARTIAL SUMMARY JUDGMENT

On this date the Court considered the Plaintiff's Motion for Partial Summary Judgment, filed May 20, 1997 and Defendant's Response, filed June 2, 1997. After careful

review, considering all admissable evidence and the arguments of counsel, the Court finds that the motion for partial summary judgment should be granted in part.[1]

Plaintiffs Owsley, et. al. bring this suit asserting that they are entitled to overtime compensation for work done as athletic trainers for Defendant San Antonio Independent School District (SAISD). Specifically, Plaintiffs assert that they are not exempt from overtime provisions because, based upon their job requirements and duties, they are not exempt "professionals," "administrators," or "executives" within the scope of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201, et seq.

Defendant SAISD argues that based on the job requirements and duties of athletic trainers, Plaintiffs must be found to be "professionals" under the FLSA, and thus are exempted from overtime pay.

The issue concerning the status of athletic trainers under FLSA is one of first impression, as neither Plaintiffs nor Defendant has directed the Court towards particular cases involving such status, and the Court has not located any on its own independent research.

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[1] Only the issue of whether Plaintiffs as athletic trainers employed by SAISD is addressed in this order. The Court holds in abeyance the issue of whether Plaintiff Hartwig, as "Head Athletic Trainer" (as specified by his contract with SAISD), is exempt from FLSA overtime pay provisions.

SUMMARY JUDGMENT STANDARD

A party is entitled to summary judgment pursuant to Federal Rule of Civil Procedure 56(c) when it demonstrates on the record that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law. In meeting this burden, the movant need only present or designate evidence which negates or disproves "the existence of any essential element of the opposing party's claim." Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986). When a summary judgment motion is properly supported, the opposing party may not rest on the allegations or denials of its pleadings, but must come forward with sufficient evidence to demonstrate a "genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986).

In the usual case, the party who seeks summary judgment must show by affidavit or other evidentiary materials that there is no genuine dispute as to any fact material to resolution of the motion. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); Anderson, 477 U.S. at 250 n.4, 106 S.Ct. at 2511 n.2; Fields v. City of S. Houston, Tx., 922 F.2d 1183, 1187 (5th Cir. 1991). In order for the Court to find there are no genuine material factual issues, the Court must be satisfied that no reasonable trier of fact could have found for the nonmoving party or, in other words, that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict for the nonmovant. *See* Anderson, 477 U.S. at 249-50, 106 S.Ct. at 2510-11; Williams v. Adams, 836 F.2d 958, 961 (5th Cir. 1988). To satisfy this burden, the movant must either submit

evidentiary documents that negate the existence of some material element of the nonmoving part's claim or defense or, if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmoving party's claim or defense. *See* Celotex Corp, 477 U.S. at 325, 106 S.Ct. at 2552.

Once the moving party has carried that burden, the burden shifts to the nonmoving party to show that summary judgment is not appropriate. *See* Fields, 922 F.2d at 1187; Lodge Hall, 831 F.2d at 79. The nonmoving party cannot discharge this burden by referring to the mere allegations or denials of the nonmoving party's pleadings; rather, that party must, either by submitting opposing evidentiary documents or by referring to evidentiary documents already in the record, set out specific facts showing that a genuine issue exists. *See* Celotex Corp., 477 U.S. at 324, 106 S.Ct. at 2553; Fields, 922 F.2d at 1187; and Fed. R.Civ.P. 56(e) .

Where the party opposing the motion for summary judgment will have the burden of proof on an essential element of his case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, summary judgment may be entered against him. Celotex Corp., 477 U.S. at 322-24, 106 S.Ct. at 2552-53.

ANALYSIS

Plaintiffs assert they are entitled to overtime pay because they are NOT exempt professionals under FLSA.

The FLSA exempts "any employee employed in a bona fide executive, administrative, or professional capacity. . ." 29 U.S.C. §213 (a) (1). The employer bears the burden of proving an employee's exempt status. Dalheim v. KDFW-TV, 918 F.2d 1220, 1230 (5th Cir. 1990); Paul v. Petroleum Equipment Tools Co., 708 F.2d 168, 169 (5th Cir. 1983); Hashop v. Rockwell Space Operations Co., 867 F.Supp. 1287, 1294 (S.D.Tex.1994). The employer's claim of exemption, as with all exemptions to the FLSA, must be construed narrowly and in favor of the employee. Arnold v. Ben Kanowsky., 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed. 2d 393, 396-397 (1960); Brennan v. Green's Propane Gas Service. Inc., 479 F.2d 1027, 1032 (5th Cir. 1973) .

Determination of professional status is guided by regulations issued by the Secretary of Labor and the Administrator of the Wage and Hour Division. Hashop, 867 F.Supp. at 1294. Since Plaintiffs earn more than $250 per week, regulations allow an employer to use a "short test" to meet its burden of proving an employee's professional status. Id. This test requires the employer to show that the employee's "primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning. . . which includes work requiring the consistent exercise of discretion and judgment." 29 C.F.R. §§541.3(e) & 541.315.[2] Therefore, two fundamental requirements must be met before an employee is an exempted

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[2] 29 C.F.R. 541.3(e) requires than an employee qualifying for the professional exemption must be paid on a salary basis. Defendant has presented evidence in the form of Plaintiffs' work contracts showing they are salaried employees, and as such it is undisputed that Plaintiffs are salaried employees.

professional: (1) The work performed requires knowledge of an advanced type; and (2) Such work necessitates the consistent use of discretion and personal judgment. The Court bears the task of determining whether, as a matter of law, Plaintiffs in their work as athletic trainers are "professionals" for FLSA purposes.

The determination of whether or not an employee is a professional under FLSA ultimately is a legal conclusion. Dalheim, 918 F.2d at 1228. Even so, "the inquiry into exempt status under [FLSA] remains intensely factbound and case specific." Id. at 1226. As such, other cases and interpretations dealing with this issue provide solely persuasive evidence, and so "should a district court find the concepts expressed inapposite to the facts before it, the court is free to engage in its own application of §213(a)(i) [of FLSA]."[3] Id. at 1228. This standard of determination authorizes the Court to determine whether or not Plaintiffs in the role as athletic trainers are exempted professionals.

(1) Knowledge of an Advanced Type

There are three elements of the "learned" professional requirement:

> (1) the knowledge [must] be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high school level;

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[3] 29 U.S.C.A. 213(a) (1) lays out the exemptions to the overtime limits set out in §§206 & 207.

> (2) it must be knowledge in a field of science or learning;
>
> (3) and the requisite knowledge. . . must be customarily acquired by a prolonged course of specialized intellectual instruction and study.

29 C.F.R. §541.301(b), (c), (d). The very terms of the regulation do not *require* employees to have college degrees to qualify for professional status. However, professionals must acquire their advanced knowledge through a "prolonged course of specialized intellectual instruction and study." 29 C.F.R. §541.301(d). Also, licensing requirements may also be evidence of a "specialized course" of study for FLSA purposes. Paul, 708 F.2d at 172.

The legal determination of professional status is not determined by the credentials brought by employees to the job, but rather by the qualifications required by the employer. Hashop, 867 F.Supp. at 1296. In the present case, Defendants lay out the job qualification requirements for athletic trainers in the individual contracts by stating, "This contract is conditioned on Employee satisfactorily providing the certification, service records, teaching credentials, and other records required by law. . . and/or SAISD." See, Defendant's Exhibits A-H. Hence, the required qualifications are dictated by regulations set forth for the certification of athletic trainers by the State of Texas, as Defendants offer no additional requirements in their summary judgment evidence.

All employees must be certified and licensed by the state before being employed as athletic trainers. TEX. REV. CIV.

STAT. ANN. art. 4512d, §8 (Vernon 1997). Applicants for an athletic training license must satisfy one of three educational prerequisites:

> (1) Have met the athletic training curriculum requirements of a college or university approved by the Advisory Board of Athletic Trainers and give proof upon graduation;
>
> (2) Hold a degree or certificate in physical therapy and have completed a basic athletic training course from an accredited college or university, and have completed an apprenticeship of 720 hours in two years, under the direct supervision of a licensed athletic trainer acceptable to the Board or as per Board approval. Actual working hours will include a minimum of 20 hours per week during each fall semester; or
>
> (3) Hold a degree in corrective therapy, with at least a minor in physical education or health, which included a basic athletic training course, and meet apprenticeship or any other requirement established by the Board.

TEX. REV. CIV. STAT. ANN. art 4512d, §9(1)-(3) (Vernon 1997); see also, 25 TAC §313.5 (Detailed educational and curriculum requirements for athletic trainer qualification).

Clearly the statutory requirements show that, as a minimum, becoming a licensed athletic trainer requires

"knowledge which cannot be attained at the high school level," because of the university course requirements. Also, the educational requirements are not a generalized scope of study, as was the case in Dybach v. Florida Dept. of Corrections, 942 F.2d 1562 (11th Cir. 1991). The Court disagrees with Plaintiffs that their qualifications rest primarily on an "apprenticeship" or "on the job" training - a form of training prohibited for purposes of the professional exemption under 29 C.F.R. §541.301(d). This is because the statutory requirements of athletic training licensure include both actual practical experience as well as particular specialized courses relating to the sports medicine and athletic training field. The highly specific course of study required, combined by the practical training required for athletic training "brings the Plaintiffs out of a mere apprenticeship form of program into the knowledge of an advanced type required for the professional exemption." See, Hashop, 867 F.Supp. at 1297.

(2) Discretion and Personal Judgment

Satisfying the knowiedge and education requirement alone do not make Plaintiffs "professionals" for FLSA purposes. "They must also consistently exercise discretion in the work to qualify." Id. A professional employee "must perform work which requires the consistent exercise of discretion and judgment in its performance." 29 C.F.R. §531.305(a). "Professional work is thus characterized by the application of special knowledge 'with discretion and judgment' and is not 'purely mechanical or routine work.'" Hashop, 867 F.Supp. at 1297, Quoting in part 29 C.F.R. §541.305(b).

In the instant case, Plaintiffs work under the supervision of a physician, and strictly within the bounds of particular guidelines. The degree of judgment and discretion permitted by SAISD to be performed by Plaintiffs may be likened to other particular cases. In Hashop, the court found that highly specialized instructors at NASA were not "professionals" because they used "their advanced training and experience to make decisions, but only *within a well-defined framework"* that the court found "inconsistent with discretion and judgment." 867 F.Supp. 1298 (emphasis added). In this case, Defendant restricts Plaintiffs, decision-making ability "according to standard treatment guidelines" in over 45 of the 77 enumerated responsibilities set out in Defendant's exhibit four. The other 30 or so responsibilities are simply mechanical or routine acts not requiring the application of specialized knowledge or training.

In Quirk v. Baltimore County, Maryland, the court found that paramedics also did not meet the requisite showing of discretion for purposes of the FLSA. The court found that paramedics "are obliged to follow strict protocols and to respond only to a physician's orders." 895 F.Supp. 773, 785. Here as well, "All Athletic Trainers. . . act under the supervision and the direction of the team physician." Defendant's exhibit 3 - "Trainers' Responsibilities." Further, procedures dictate that in the event of an emergency at Alamo Stadium, "Immediate treatment will be based on the athletic trainer's knowledge and *discretion of the team physician."* Defendant's exhibit 3 (emphasis added).

Authority to make decisions "about problems to which there were often no recognized or established answers," is evidence of discretion. Paul, 708 F.2d at 170. Furthermore,

when decisions must be made only after consulting with a superior the employee is "merely a highly trained technician" and not a professional under the FLSA. Id. Here Plaintiffs are only to respond to situations within which there are pre-set procedures and guidelines. Once a situation arises which is beyond the of their scope procedures, they must defer to the *discretion* of the doctor.

Because Plaintiff may only make decisions within a well-defined and regulated framework and the application of their specialized knowledge is limited to enumerated pre-set situations, the Court finds that they lack the discretion and judgment in their duties as athletic trainers to be exempted "professionals" for purposes of the FLSA.

CONCLUSION

As laid out, FLSA requires that employers meet a two prong test in demonstrating that an employee is an exempt professional under the act. Employees must both acquire an advanced and specialized type of education, as well as consistently use discretion and judgment in their work. Though the determination of whether an employee is a "professional" is fact intensive, the ultimate conclusion is of a legal nature, within the scope of this Court to make. As such, the Court finds that Plaintiffs do not exercise discretion and judgment as applied to the FLSA because of the specified scope of their duties and responsibilities. Therefore, as a matter of law they are not exempted professionals under the FLSA.

Accordingly, it is hereby ORDERED that Plaintiff's Motion for Partial Summary Judgment is GRANTED IN PART.

SIGNED and ENTERED this 20th day of June 1997.

/s/_____
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF THE TEXAS SAN ANTONIO DIVISION

[Filed July 30, 1997]

No. SA-96-CA-0922

CHARLES S. OWSLEY, REX L. HARTWIG, JUAN J. LEAL, JERRY R. LUCE, PAUL MARK SNODGRASS, RAYMOND RAMIREZ, CHARLES A. TREVINO and MICHAEL LELAND POST, *Plaintiffs*,	)
v.	)
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT, *Defendant.*	)

ORDER

On this date the Court considered the Defendant's Motion for Reconsideration to Alter the June 20, 1997 Order granting in part Plaintiff's Motion for Partial Summary Judgment, filed July 7, 1997 and Plaintiff' Response, filed

July 16, 1997. After careful review, considering all admissible evidence and the arguments of counsel, the Court DENIES the Motion to Alter the Judgment.

Defendant San Antonio Independent School District (SAISD) seeks to have the Court alter its judgment concerning the professional status of Plaintiffs as high school athletic trainers employed by SAISD. Specifically, Defendant requests the Court to vacate that portion of the Order declaring that Plaintiffs do not exercise discretion and independent judgment within the scope of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201, et seq., and render a new Order denying Plaintiff's Motion for Partial Summary Judgment.

As noted in the June 20 Order, the issue concerning the status of athletic trainers under FLSA is one of first impression. The Court finds useful the analysis set forth in other federal cases, as well as the particular circumstances of this case to arrive at its conclusion that Plaintiffs do not exercise discretion in their work, and hence do not qualify as exempted "professionals" under the FLSA.

ANALYSIS

Plaintiffs assert they are entitled to overtime pay because they are NOT exempt professionals under FLSA. The FLSA exempts "any employee employed in a bona fide executive, administrative, or professional capacity. . ." 29 U.S.C. §213 (a) (1). The employer bears the burden of proving an employee's exempt status. Dalheim v. KDFW-TV, 918 F.2d 1220, 1230 (5th Cir. 1990); Paul v. Petroleum Equipment Tools Co., 708 F.2d 168, 169 (5th Cir. 1983).

The employer's claim of exemption, as with all exemptions to the FLSA, must be construed narrowly and in favor of the employee. Arnold v. Ben Kanowsky, 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed. 2d 393, 396-397 (1960); Brennan v. Green's Propane Gas Service, Inc., 479 F.2d 1027, 1032 (5th Cir. 1973).

Determination of professional status is guided by regulations issued by the Secretary of Labor and the Administrator of the Wage and Hour Division. Hashop v. Rockwell Space Operations Co., 867 F.Supp. at 1294 (S.D.Tex. 1994) (vacated on other grounds). Since Plaintiffs earn more than $250 per week, regulations allow an employer to use a "short test" to meet its burden of proving an employee's professional status. This test requires the employer to show that the employee's "primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning . . . which includes work requiring the consistent exercise of discretion and judgment." 29 C.F.R. §§541.3(e) & 541.315.[1] Therefore, two fundamental requirements must be met before an employee is an exempted professional: (1) The work performed requires knowledge of an advanced type; and (2) Such work necessitates the consistent use of discretion and personal judgment. The Court bears the task of determining whether, as a matter of law, Plaintiffs in their work as athletic trainers are "professionals" for FLSA purposes.

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[1] 29 C.F.R. 541.3(e) requires than an employee qualifying for the professional exemption must be paid on a salary basis. Defendant has presented evidence in the form of Plaintiffs' work contracts showing they are salaried employees, and as such it is undisputed that Plaintiffs are salaried employees.

The determination of whether or not an employee is a professional under FLSA *ultimately* is a legal conclusion. Dalheim, 918 F.2d at 1228. Even so, "the inquiry into exempt status under [FLSA] remains intensely factbound and case specific." Id. at 1226. Defendants' Motion notes that this Court erred in "relying" on Hashop as the case was later vacated subsequent to a settlement between the parties. 867 F.Supp. 1287. Defendants themselves refer extensively to the Hashop opinion in their Motion for Partial Summary Judgment and Response to Plaintiff's Motion for Partial Summary Judgment even after their "diligent review of cited case law." Defendant's Motion for Reconsideration, p.3. This Court simply notes that it found persuasive the published Hashop opinion's reasoning and analysis, but in no way is the June 20 Order controlled by the Hashop case. Defendants fail to recognize that all references to Hashop in the June 20 Order can also be made to other published cases, except those instances where the specific facts of Hashop were noted. As such, other cases and interpretations dealing with this issue provide solely persuasive evidence. Even so, "*should a district court find the concepts expressed inapposite to the facts before it, the court is free to engage in its own application of §213(a)(1) [of FLSA].*"[2] Dalheim 918 F.2d. at 1228 (emphasis added). This standard of determination, set forth by the Fifth Circuit in Dalheim authorizes the Court to independently determine whether or not Plaintiffs in the role as athletic trainers are exempted professionals.

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[2] 29 U.S.C.A. 213(a) (1) lays out the exemptions to the overtime limits set out in §§206 & 207.

As Defendant's Motion for Reconsideration expressly seeks reconsideration of the "discretion" prong, only that element will be examined.

Discretion and Personal Judgment

Satisfying the knowledge and education requirement alone do not make Plaintiffs "professionals" for FLSA purposes. "They must also consistently exercise discretion in the work to qualify." Hashop, 867 F.Supp. at 1297 (vacated on other grounds). A professional employee "must perform work which requires the consistent exercise of discretion and judgment in its performance." 29 C.F.R. §531.305(a). "Professional work is thus characterized by the application of special knowledge 'with discretion and judgment, and is not 'purely mechanical or routine work.'" 29 C.F.R. §541.305(b) .

In Quirk v. Baltimore County, Maryland, the court found that paramedics did not meet the requisite showing of discretion for purposes of the FLSA. 895 F.Supp. 773 (D.Md. 1995). It noted that paramedics "are obliged to follow strict protocols and to respond only to a physician's orders." 895 F.Supp. 773, 785. Here as well, "All Athletic Trainers . . . act under the supervision and the direction of the team physician." Exhibit 3 to Defendant's Motion for Summary Judgment - "Athletic Trainer's Job Description." Further, procedures dictate that in the event of an emergency at Alamo Stadium, "Immediate treatment will be based on the athletic trainer's knowledge and *discretion of the team physician*." Id. (emphasis added). Defendant claims that Plaintiffs "maintain the first and *ultimate* authority for medical emergencies at almost all of SAISD's sporting events and

practices." Defendant's Motion for Reconsideration, p.6 (emphasis added). This is in direct contradiction to Defendant's exhibit 3 which states, "The trainers' responsibility is to the Coordinating Trainer as well as to his/her Senior School Principal. They will also act under the supervision and the direction of the team physician." It hardly seems plausible that with such explicit instructions SAISD's athletic trainers maintain the "*ultimate* authority for medical emergencies." (emphasis added). If anything, when such emergencies arise, if a doctor is not present, athletic trainers are instructed to defer to the expertise and authority of paramedics, which have been determined to be non-professionals for purposes of the FLSA. See Exhibit 3 Defendant's Motion for SJ

Authority to make decisions "about problems to which there were often no recognized or established answers," is evidence of discretion. Paul, 708 F.2d at 170. Furthermore, when decisions must be made only after consulting with a superior the employee is "merely a highly trained technician" and not a professional under the FLSA. Id. Here Plaintiffs are only to respond to situations within which there are pre-set procedures and guidelines. Once a situation arises which is beyond the scope of their procedures, they must defer to the *discretion* of the doctor, or expertise of paramedics at an emergency. As Defendant's team physician remarked in his deposition, "They (athletic trainers) have to refer the patient on to a physician, if they are going to carry on treatment more than the initial first aid treatment, because they really don't have the license to do that." Exhibit 30 to Defendant's Motion for SJ, p.24 (Hereafter "Exhibit 30"). That initial first aid treatment is particularly similar to the work paramedics do.

Defendant's Motion for Reconsideration argues that it is inappropriate for this Court to analogize the duties of athletic trainers employed by SAISD with the paramedics in Quirk because athletic trainers maintain longer-term relationships with their patients than do paramedics. The Court disagrees. First, as noted by SAISD's team physician, beyond the initial first aid treatment rendered, athletic trainers refer patients to doctors, like paramedics. Second, the extent of the relationship with the patient during rehabilitation does not add to Plaintiffs, discretion at work, as their duties are to apply orders and procedures set forth by the treating physician. As Defendant's team physician stated, "They (Plaintiffs) don't determine appropriate rehabilitation programs. Those are done -- that's part of the prescription from the physician." Exhibit 30, p.34. No greater degree of decision-making results during the rehabilitation process. If an injury reoccurs, the athletic trainer repeats the first aid procedures, and again refers the student to the responsible physician.

Further, Defendant's argument that paramedics in the Quirk case were reprimanded for not following standardized guidelines is of no relevance here, as Plaintiffs properly note in their Response that athletic trainers in Texas are similarly subject to disciplinary action if they reach beyond their delegated duties. See, 25 T.A.C. §313.16; and §313.15(b), (c) (9). The degree of personal judgment is finitely limited for athletic trainers; their role is to apply the knowledge gained during their education to well-defined situations. Anything beyond that point is done only with the approval and under the advisement of a physician.

In addition, Plaintiffs are not comparable to nurses in the amount of discretion they hold. In Hofer v. Federal Cartridge Corporation, the court held that nurses are professionals under FLSA because they hold "the analysis and training and skill necessary to determine the extent and seriousness, and often the type of injury or complaint, as well as what particular remedy should be given or applied." 71 F.Supp. 243 (D.Minn. 1947). Hofer continues to explain why nurses are not merely "highly trained technicians": their work is "intellectual and *varied* in character," and also because "certainly it would be difficult to *standardize their work in relation to any given period of time.*" 71 F.Supp. at 245 (emphasis added). The types of injuries and complaints evaluated by high school athletic trainers are fairly standard and recurrent over time, as compared to the fluctuations and variations a nurse may see. See., Hofer, 71 F.Supp. at 245; Exhibit 30, p. 11-12 ("Peg Board System" used by athletic trainers to make initial evaluations of what injury is sustained). It is well established that physicians and other health care professionals conduct procedures and make judgments which athletic trainers are forbidden to do. Exhibit 30, p.42-44. The standard treatment guidelines constitute the outer bound of an athletic trainer's responsibilities, while only being the minimum field from which other health care professionals operate. See, Defendant's Motion for Reconsideration, note 3, p.8; See Also, Exhibit 30, p.42-44. Concluding that all three parties have discretion under FLSA because they all refer to the same initial guidelines is inappropriate.

CONCLUSION

In the instant case, Plaintiffs work under the supervision of a physician, and strictly within the bounds of particular guidelines. Defendant restricts Plaintiffs, decision-making ability "according to standard treatment guidelines" in over 45 of the 77 enumerated responsibilities set out in Defendant's exhibit four. The other 30 or so responsibilities are simply mechanical or routine acts not requiring the application of specialized knowledge or training. Because Plaintiffs may only make decisions within a well-defined and regulated framework and the application of their specialized knowledge is limited to enumerated pre-set situations, the Court finds that they lack the discretion and judgment in their duties as athletic trainers to be exempted "professionals" for purposes of the FLSA. Recall, "professional work is thus characterized by the application of special knowledge 'with discretion and judgment' and is not 'purely mechanical or routine work.'" 29 C.F.R. §541.305(b). The Court does not find that Plaintiffs apply their special knowledge with "discretion and judgment." Rather, Plaintiffs as athletic trainers with SAISD perform "routine work" well-defined with boundaries and supervision from more senior employees and health-care practioners. Therefore, as a matter of law they are not exempted professionals under the FLSA.

Accordingly, it is hereby ORDERED that Defendant's Motion to Alter the Judgment of the June 20, 1997 Order Granting in Part Plaintiffs' Motion Partial Summary Judgment is DENIED.

SIGNED and ENTERED this 29th day of July, 1997.

/s/ _____
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Filed October 18, 1999]

No. 98-50743

CHARLES S. OWSLEY; REX L. HARTWIG; JUAN J. LEAL, JERRY R. LUCE; PAUL MARK SNODGRASS; RAYMOND RAMIREZ; CHARLES A. TREVINO; MICHAEL LELAND POST	)
Plaintiffs - Appellees - Cross-Appellants	)
v.	)
SAN ANTONIO INDEPENDENT SCHOOL DISTRICT	)
Defendant - Appellant Cross-Appellee	)

Appeal from the United States District Court for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 9/13/99, 5 Cir., _____, _____ F.3d _____)

Before JOLLY and SMITH, Circuit Judges, and VANCE, District Judge.*

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R.APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

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* District Judge of the Eastern District of Louisiana, sitting by designation.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND
LOCAL RULES 41
FOR STAY OF
MANDATE

APPENDIX E

Fair Labor Standards

29 USC § 201 Short Title

This chapter may be cited as the "Fair Labor Standards Act of 1938."

29 USC § 204 Administration

(a) Creation of Wage and Hour Division in Department of Labor; Administrator

There is created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this chapter referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate.

(b) Appointment, selection, classification, and promotion of employees by Administrator

The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this chapter and shall fix their compensation in accordance with chapter 51 and subchapter III of chapter 53 of Title 5. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys

appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) Principal office of Administrator; jurisdiction

The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

29 USC § 206 - Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than $4.25 an hour during the period ending on September 30, 1996, not less than $4.75 an hour during the year beginning on October 1, 1996, and not less than $5.15 an hour beginning September 1, 1997.

29 USC § 207 - Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966–

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for this empioyment in excess of the hours above specified at the rate not less than one and one-half times the regular rate and which he is employed.

29 USC § 213 - Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of section 206 (except subsection (d) in this case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to–

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teach in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); . . .

29 USC § 259 Reliance in future on administrative rulings, etc.

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40

U.S.C.A. § 276a et seq.], if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be –

(1) in the case of the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.] – the Administrator of the Wage and Hour Division of the Department of Labor;

* * *

APPENDIX F

Subpart A - General Regulations

PART 541 Defining and delimiting the terms "Any employee employed in a bona fide executive administrative, or professional capacity (including any employee employed in the capacity of Academic Administrative Personnel or Teacher in Elementary or Secondary Schools), or in the capacity of Outside Salesman"

§ 541.0 Terms used in regulations.

(a) *Administrator* means the Administrator of the Wage and Hour Division, U.S. Department of Labor. The Secretary of Labor has delegated to the Administrator the functions vested in him under section 13(a)(1) of the Fair Labor Standards Act.

(b) *Act* means the Fair Labor Standards Act of 1938, as amended.

§ 541.3 Professional

The term *employee employed in a bona fide* * * * *professional capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the performance of:

(1) Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a

prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes, . . . and

(b) Whose work requires the consistent exercise of discretion and judgment in its performance;

Subpart B - Interpretations

§ 541.99 - Introductory statement

(a) Section 13(a)(1) of the Fair Labor Standards Act, as amended, exempts from the wage and hour provisions of the act "any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic, administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 percent of his hours worked in the work week are devoted to such activities)." The requirements of the exemption under this section of the act are contained in subpart A of this part.

§ 541.103 - Primary duty

A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercised discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. For example, in some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manage of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require. He will be considered to have management as his primary duty. In the data processing field

an employee who directs the day-to-day activities of a single group of programers and who performs the more complex or responsible jobs in programing will be considered to have management as his primary duty.

§ 541.206 Primary duty.

(a) The definition of "administrative" exempts only employees who are primarily engaged in the responsible work which is characteristic of employment in a bona fide administrative capacity. Thus, the employee must have as his primary duty office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers, or, in the case, of "academic administrative personnel," the employee must have as his primary duty work that is directly related to academic administration or general academic operations of the school in whose operations he is employed.

(b) In determining whether an employee's exempt work meets the "primary duty" requirement, the principles explained in § 541.103 in the discussion of "primary duty" under the definition of "executive" are applicable.

§ 541.207 Discretion and independent judgment

(a) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible course of conduct and acting or making a decision after the various possibilities have been considered. The term as used in the regulations in subpart A of this part, moreover, implies that the person has the authority or power to make an independent choice, free from immediate direction

or supervision and with respect to matters of significance. (Without actually attempting to define the term, the courts have given it this meaning in applying it in particular case. *See*, for example, *Walling v. Sterling Ice Co.*, 69 F.Supp. 655 reversed on other grounds, 165 F. (2d) 265 (CCA 10), See also *Connell v. Delaware Aircraft Industries*, 55 Atl. (2d) 637.)

(b) The term must be applied in the light of all the facts involved in the particular employment situation in which the question arises. It has been most frequently misunderstood and misapplied by employers and employees in cases involving the following: (1) Confusion between the exercise of discretion and independent judgment, and the use of skill in applying techniques, procedures, or specific standards; and (2) misapplication of the term to employees making decision relating to matters of little consequence.

(c) Distinguished from skills and procedures:

(1) Perhaps the most frequent cause of misapplication of the term "discretion and independent judgment" is the failure to distinguish it from the use of skill in various respects. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specified standards are met to whether an object falls into one or another of a number of definite grades, classes, or other categories, with or without the use of testing or measuring devices, is not exercising discretion and independent judgment within the meaning of § 541.2. This is true even if there is some leeway in reaching a conclusion, as when an acceptable standard includes a range or a tolerance above or below a specific standard.

(2) A typical example of the application of skills and procedures is ordinary inspection work of various kinds.

Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been cataloged and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They may have some leeway in the performance of their work but only within closely prescribed limits. Employees of this type may make recommendations on the basis of the information they develop in the course of their inspections (as for example, to accept or reject an insurance risk or a product manufactured to specifications), but these recommendations are based on the development of the facts as to whether there is conformity with the prescribed standards. In such cases a decision to depart form the prescribed standards or the permitted tolerance is typically made by the inspector's superior. The inspector is engaged in exercising skill rather than discretion and independent judgment within the meaning of the regulations in Subpart A of this part.

(3) A related group of employees usually called examiners or graders perform similar work involving the comparison of products with established standards which are frequently cataloged. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for the manual of standards does not convert the character of the work performed to work requiring the exercise of discretion and independent judgment as required by the regulations in subpart A of this part. The mere fact that the employee uses his knowledge and experience does not change his decision *i.e.* that the product does or does not conform with the established standard, into a real decision in a significant matter.

(4) For example, certain "graders" of lumber turn over each "stick" to see both sides, after which a crayon mark is made to indicate the grade. These lumber grades are well established and the employee's familiarity with them stems from his experience and training. Skill rather than discretion and independent judgment is exercised in grading the lumber. This does not necessarily mean, however, that all employees who grade lumber or other commodities are not exercising discretion and independent judgment. Grading of commodities for which there are no recognized or established standards may require the exercise of discretion and independent judgment as contemplated by the regulations in subpart A of this part. In addition, in those situations in which an otherwise exempt buyer does grading, the grading even though routine work, may be considered exempt if it is directly and closely related to the exempt buying.

(5) Another type of situation where skill in the application of techniques and procedures is sometimes confused with discretion and independent judgment is the "screening" of applications by a personnel clerk. Typically such an employee will interview applicants and obtain from them data regarding their qualifications and fitness for employment. These data may be entered on a form specially prepared for the purpose. The "screening" operation consists of rejecting all applicants who do not meet standards for the particular job or for employment by the company. The standards are usually set by the employee's superior or other company officials, and the decision to hire from the group of applicants who do meet the standards is similarly made by other company officials. It seems clear that such a personnel clerk does not exercise discretion and independent judgment as required by the regulations in subpart A of this part. On the other hand an exempt personnel manager will often

perform similar functions; that is, he will interview applicants to obtain the necessary data and eliminate applicants who are not qualified. The personnel manager will then hire one of the qualified applicants. Thus, when the interviewing and screening are performed by the personnel manager who does the hiring they constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(6) Similarly, comparison shopping performed by an employee of a retail store who merely reports to the buyer his findings as to the prices at which a competitor's store is offering merchandise of the same or comparable quality does not involve the exercise of discretion and judgment as required in the regulations. Discretion and judgment are exercised, however, by the buyer who evaluates the assistants' reports and on the basis of their findings directs that certain items be re-priced. When performed by the buyer who actually makes the decisions which affect the buying or pricing policies of the department he manages, the comparison shopping, although in itself a comparatively routine operation, is directly and closely related to his managerial responsibility.

(7) In the data processing field a systems analyst is exercising discretion and independent judgment when he develops methods to process, for example, accounting, inventory, sales, and other business information using electronic computers. He also exercises discretion and independent judgment when he determines the exact nature of the data processing problem, and structures the problem in a logical manner so that a system to solve the problem and obtain the desired results can be developed. Whether a computer programer is exercising discretion and independent judgment depends on the facts in each particular case. Every problem processed in a computer first must be carefully

analyzed so that exact and logical steps for its solution can be worked out. When this preliminary work is done by a computer programer he is exercising discretion and independent judgment. A computer programer would also be using discretion and independent judgment when he determines exactly what information must be used to prepare the necessary documents and by ascertaining the exact form in which the information is to be presented. Examples of work not requiring the level of discretion and judgment contemplated by the regulations are highly technical and mechanical operations such as the preparation of a flow chart or diagram showing the order in which the computer must perform each operation, the preparation of instructions to the console operator who runs the computer or the actual running of the computer by the programmer, and the debugging of a program. It is dear that the duties of data processing employees such as tape librarians, keypunch operators, computer operators, junior programers and programer trainees are so closely supervised as to preclude the use of the required discretion and independent judgment.

(d) *Decisions in significant matters.*

(1) The second type of situation in which some difficulty with this phrase has been experienced relates to the level or importance of the matters with respect to which the employee may make decisions. In one sense almost every employee is required to use some discretion and independent judgment. Thus, it is frequently left to a truckdriver to decide which route to follow in going from one place to another; the shipping clerk is normally permitted to decide the method of packing and the mode of shipment of small orders; and the bookkeeper may usually decide whether he will post first to one ledger rather than other. Yet it is obvious that these decisions do not constitute the exercise of discretion and

independent judgment of the level contemplated by the regulations in subpart A of this part. The divisions have consistently taken the position that decisions of this nature concerning relatively unimportant matters are not those intended by the regulations in subpart A of this part, but that the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence. This interpretation has also been followed by courts in decisions involving the application of the regulations in this part, to particular cases.

(2) It is not possible to state a general rule which will distinguish in each of the many thousands of possible factual situations between the making of real decisions in significant matters and the making of choices involving matters of little or no consequence. It should be clear, however, that the term "discretion and independent judgment," within the meaning of the regulations in subpart A of this part, does not apply to the kinds of decisions normally made by clerical and similar types of employees. The term does apply to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise. The regulations in subpart A of this part, however, do not require the exercise of discretion and independent judgment at so high a level. The regulations in subpart A of this part also contemplate the kind of discretion and independent judgment exercised by an administrative assistant to an executive, who without specific instructions or prescribed procedures, arranges interviews and meetings, and handle callers and meetings himself where the executive's personal attention is not required. It includes the kind of discretion and independent judgment exercised by

a customer's man in a brokerage house in deciding what recommendations to make to a customer for the purchase of securities. It may include the kind of discretion and judgment exercised by buyers, certain wholesale salesmen, representatives, and other contact persons who are given reasonable latitude in carrying on negotiation on behalf of their employers.

(e) *Final decisions not necessary.* (1) The term "discretion and independent judgment" as used in the regulations in subpart A of this part does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment within the meaning of the regulations in subpart A of this part. For example, the assistant to the president of a large corporation may regularly reply to correspondence addressed to the president. Typically, such an assistant will submit the more important replies to the president for review before they are sent out. Upon occasion, after review, the president. may alter or discard the prepared reply and direct that another be sent instead. This section by the president would not, however, destroy the exempt character of the assistant's function, and does not mean that he does not exercise discretion and independent judgment in answering correspondence and in deciding which replies may be sent out without review by the president.

(2) The policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization, may have the plan reviewed or revised by his superiors before it is submitted to the client. The purchasing agent may be required to consult with top management officials before making a purchase commitment for raw materials in excess of the contemplated plant needs for a stated period, say 6 months. These employees exercise discretion and independent judgment within the meaning of the regulations despite the fact that their decisions or recommendations are reviewed at a higher level,

(f) *Distinguished from loss through neglect.* A distinction must also be made between the exercise of discretion and independent judgment with respect to matters of consequence and the cases where serious consequences may result from the negligence of an employee, the failure to follow instruction or procedures, the improper application of skills, or the choice of the wrong techniques. The operator of a very intricate piece of machinery, for example, may cause a complete stoppage of production or a breakdown of his very expensive machine merely by pressing the wrong button. A bank teller who is engaged in receipt and disbursement of money at a teller's window and tn related routine bookkeeping duties may, by crediting the wrong account with a deposit, cause his employer to suffer a large financial loss. An inspector charged with responsibility for loading off onto a ship may, by not applying correct techniques fall to notice the presence of foreign ingredients in the tank with resulting contamination of the cargo and serious loss to his employer. In these cases, the work of the employee does not require the

exercise of discretion and independent judgment within the meaning of the regulations in subpart A of this part.

(g) *Customarily and regularly.* The work of an exempt administrative employee must require the exercise of discretion and independent judgment customarily and regularly. The phrase "customarily and regularly" signifies a frequency which must be greater than occasional but which, of course, may be less than constant. The requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretion and independent judgment in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretion and independent judgment.

§ 541.301 - Learned professions

(a) The "learned" professions are described in § 541.3(a)(1) as those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study as distinguished from a general academic education and from an apprenticeship and from training in the performance of routine mental, manual, or physical processes.

(b) The first element in the requirement is that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high school level.

(c) Second, it must be knowledge in a field of science or learning. This serves to distinguish the professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning.

(d) The requisite knowledge, in the third place, must be customarily acquired by a prolonged course of specialized intellectual instruction and study. Here it should be noted that the word "customarily" has been used to meet a specific problem occurring in many industries. As is well known, even in the classical profession of law, there are still a few practitioners who have gained their knowledge by home study and experience. Characteristically, the members of the profession are graduates of law schools, but some few of their fellow professionals whose status is equal to theirs, whose attainments are the same, and whose word is the same did not enjoy that opportunity. Such persons are not barred from the exemption. The word "customarily" implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession. It makes the exemption available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry, etc., but it does not include the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training. It should be noted also that many employees in these quasi-professions may qualify for exemption under other sections of the regulations in subpart A of this part or under the alternative paragraph of the "professional" definition applicable to the artistic fields.

(e)(1) Generally speaking the professions which meet the requirement for a prolonged course of specialized intellectual instruction and study include law, medicine, nursing, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, including pharmacy and registered or certified medical technology and so forth. The typical symbol

of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is a standard (if not universal) prequisite. In the case of registered (or certified) medical technologists, successful completion of 3 academic years of preprofessional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association will be recognized as a prolonged course of specialized intellectual instruction and study. Registered nurses have traditionally been recognized as professional employees by the Division in its enforcement of the act. Although, in some cases, the course of study has become shortened (but more concentrated), nurses who are registered by the appropriate State examining board will continue to be recognized as having met the requirement of § 541.3(a)(1) of the regulations.

(2) The areas in which professional exemptions may be available are expanding. As knowledge is developed, academic training is broadened, degrees are offered in new and diverse fields, specialties are created and the true specialist, so trained, who is given new and greater responsibilities, comes closer to meeting the tests. However, just as an excellent legal stenographer is not a lawyer, these technical specialists must be more than highly skilled technicians. Many employees in industry rise to executive or administrative positions by their natural ability and good common sense, combined with long experience with a company, without the aid of a college education or degree in any area. A college education would perhaps give an executive or administrator a more cultured and polished approach but the necessary know-how for doing the executive

job would depend upon the person's own inherent talent. The professional person, on the other hand, attains his status after a prolonged course of specialized intellectual instruction and study.

(f) Many accountants are exempt as professional employees (regardless of whether they are employed by public accounting firms or by other types of enterprises). (Some accountants may qualify for exemption as bona fide administrative employees.) However, exemption of accountants, as in the case of other occupational groups (see § 541.308), must be determined on the basis of the individual employee's duties and the other criteria in the regulations. It has been the Divisions' experience that certified public accountants who meet the salary requirement of the regulators will, except in unusual cases, meet the requirements of the professional exemption since they meet the tests contained in § 541.3. Similarly, accountants who are not certified public accountants may also be exempt as professional employees if they actually perform work which requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of "Professional" employee. Accounting clerks, junior accountants, and other account ants, on the other hand, normally perform a great deal of routine work which is not an essential part of and necessarily incident to any profession al work which they may do. Where these facts are found such accountants are not exempt. The title "Junior Accountant," however, is not determinative of failure to qualify for exemption any more than the title "Senior Accountant" would necessarily imply that the employee is exempt.

(g)(1) A requisite for exemption as a teacher is the condition that the employee is "employed and engaged" in this

activity as a teacher in the school system, or educational establishment or institution by which he is employed.

(2) "Employed and engaged as a teacher" denotes employment and engagement in the named specific occupational category as a requisite for exemption. Teaching consists of the activities of teaching, tutoring, instructing, lecturing, and the like in the activity of imparting knowledge. Teaching personnel may include the following (although not necessarily limited to): Regular academic teachers' teachers of kindergarten or nursery school pupils or of gifted or handicapped children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisers in such areas as drama, forensics, or journalism are engaged in teaching. Such activities are a recognized part of the school's responsibility in contributing to the educational development of the student.

(3) Within the public schools of all States, certificates, whether conditional or unconditional, have become a uniform requirement for employment as a teacher at the elementary and secondary levels. The possession of an elementary or secondary teacher's certificate provide a uniform means of identifying the individual contemplated as being within the scope of the exemption provided by the statutory language and defined in § 541.3(a)(3) with respect to all teachers employed in public schools and those private schools who possess State certificates. However, the private schools of all the States are not uniform in requiring certificate for employment as an elementary or secondary school teacher

and teacher's certificates are not generally necessary for employment as a teacher in institutions of higher education or other educational establishments which rely on other qualification standards. Therefore, a teacher who is not certified but is engaged in teaching in such a school may be considered for exemption provided that such teacher is employed as a teacher by the employing school or school system and satisfies the other requirements of § 541.3.

(4) Whether certification is conditional or unconditional will not affect the determination as to employment within the scope of the exemption contemplated by this section. There is no standard terminology within the States referring to the different kinds of certificates. The meanings of such labels as permanent, standard, provisional, temporary, emergency, professional, highest standard, limited, and unlimited vary widely, For the purpose of this section, the terminology affixed by the particular State in designating the certificates does not affect the determination of the exempt status of the individual.

§ 541.304 Primary duty.

(a) For a general explanation of the term "primary duty" see the discussion of this term under "executive" in § 541.103. See also the discussion under "administrative" in § 541.206.

(b) The "primary duty" of an employee as a teacher must be that of activity in the field of teaching. Mere certification by the State, or employment in a school will not suffice to qualify an individual for exemption within the scope of § 541.3(a)(3) if the individual is not in fact both employed and engaged as a teacher (see § 541.203(g)(2)). The words "primary duty" have the effect of placing major emphasis on

the character of the employee's job as a whole. Therefore, employment and engagement in the activity of imparting knowledge as a primary duty shall be determinative with respect to employment within the meaning of the exemption as "teacher" in concjunction with the other requirements of § 541.3.

§ 541.305 Discretion and judgment

(a) Under § 541.3 a professional employee must perform work which requires the consistent exercise of discretion and judgment in its performance.

(b) A prime characteristic of professional work is the fact that the employee does apply his special knowledge or talents with discretion and judgment. Purely mechanical or routine work is not professional.

§ 541.306 Predominantly intellectual and varied.

(a) Section 541.3 requires that the employee be engaged in work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work. This test applies to the type of thinking which must be performed by the employee in question. While a doctor may make 20 physical examinations in the morning and perform in the course of his examinations essentially similar tests, it requires not only judgment and discretion on his part but a continual variety of interpretation of the tests to perform satisfactory work. Likewise, although a professional chemist may make a series of similar tests, the problems presented will vary as will the deductions to be made therefore. The work of the true professional is inherently

varied even though similar outward actions may be performed.

(b) Another example of this is the professional medical technologist who performs complicated chemical microscopic and bacteriological tests and procedures. In a large medical laboratory or clinic, the technologist usually specialized in make several kinds of related tests in areas such as microbiology, parasitology, biochemistry, hematology, histology, cytology, and nuclear medical technology. The technologist also does the blood banking. He will also conduct tests related to the examination and treatment of patients, or do research on new drugs, or on the improvement of laboratory techniques, or teach and perform administrative duties. The simple, routine and preliminary tests are generally performed by laboratory assistants or technicians. However, technologists who work in small laboratories may perform tasks that are performed by nonexempt employees in larger establishments. This type of activity will not necessarily be considered nonexempt (see § 541.307).

(c) On the other hand, X-ray technicians have only limited opportunity for the exercise of independent discretion and judgment, usually performing their duties under the supervision of a more highly qualified employee. The more complex duties of interpretation and judgment in this field are performed by obviously exempt professional employees.

§ 541.315 Special proviso for high salaried professional employees

(a) Except as otherwise noted in paragraph (b) of this section, the definition of "professional" contains a special proviso for employees who are compensated on a salary or fee basis at a rate of at least $250 per week exclusive of board,

lodging, or other facilities. Under this proviso, the requirements for exemption in § 541.3 (a) through (e) will be deemed to be met by an employee who receives the higher salary or fees and whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning, or work as a teacher in the activity of imparting knowledge, which includes work requiring the consistent exercise of discretion and judgment, or consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor. Thus, the exemption will apply to highly paid employees employed either in one of the "learned" professions or in an "artistic" profession and doing primarily professional work. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under § 541.3 (a) through (e).

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed: April 25, 1991]

No. 90-3238

JOANIE DYBACH,
Plaintiff-Appellant,

v.

STATE OF FLORIDA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida
Orlando Division

BRIEF FOR THE SECRETARY OF LABOR
AS AMICUS CURIAE

* * *

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The employer contends that this instruction correctly paraphrased the definition of a professional employee set forth

in Paul v. Petroleum and Equipment Tools Co., 708 F.2d 168, 170 (5th Cir. 1983), and urges that Paul is a correct statement of the law.

As discussed in the margin, the Secretary views the holding in Paul to be incorrect.[5]

* * *

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CONCLUSION

For the foregoing reasons, this Court should reverse the district court by finding as a matter of law that the employer-appellee had not satisfied the requirements of the professional exemption and should remand the case for a

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[5] Paul held that a company airplane pilot was properly found to be an exempt professional employee. The court of appeals affirmed the district court's finding that the instruction and training received by a pilot necessary to obtain the required FAA certificates, as demonstrated in the FAA's official testing manuals, constitutes the functional equivalent of the advanced degree necessary for a professional. The regulations state, however, that it is not sufficient to be a highly skilled technician. 29 C.F.R. 541.302(e)(2). The regulations also speak in terms of "intellectual" instruction. On that basis the Paul decision is simply incorrect. The Department has always found pilots not to be exempt professionals, but has always had a non-enforcement position for them if they possessed the requisite Government flight certificates and made above a specified amount. See U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division Field Operations Handbook, section 52L01.

determination of the amount of back wages owed. In addition, this Court should reverse the district court's denial of liquidated damages and order that on remand the district court shall award liquidated damages in an amount equal to the back wages which are determined to be owing.

Respectfully submitted,

ROBERT P. DAVIS
Solicitor

MONICA GALLAGHER
Associate Solicitor
Fair Labor Standards

WILLIAM J. STONE
Counsel for Appellate
Litigation

/s/_____
LF[I]F JORGENSON
Attorney

U.S. DEPARTMENT OF LABOR
Washington D.C. 20210
(202) 523-7600

APPENDIX H

Opinion Letter of Wage-Hour Administrator
Opinion Letter No. 798, May 10, 1968.

Fair Labor Standards Act

Exemptions - Executive, Administrative and Professional Employees - Athletic Trainer. An athletic trainer supervised by a head football coach does not meet the tests for exemption as an executive or administrative employee, particularly since his duties consist primarily of improving the physical fitness of football players, with 60 percent of his time being spent in administering physical therapy treatments and in prescribing and conducting, off-season, conditioning programs. Nor would he qualify as a professional employee since the minimum educational requirement for the job consists only of on-the-job training. FLSA, Section 13(a)(1).

This is in further reply to your letter concerning the exemption status of an athletic trainer employed by a university under section 13(a)(1) of the Fair Labor Standards Act.

The requirements for exemption as an employee employed in a bona fide executive administrative, or professional capacity under this section are prescribed in Regulations, Part 541. The job description which you have provided indicates that the athletic trainer is supervised by the head football coach, and that his duties consist primarily of

improving the physical fitness of football players, with 60 percent of his time being spent in administering physical therapy treatments such as heat treatments, whirlpool baths, neck traction devices, and protective taping, and in prescribing and conducting off-season conditioning programs. Another 25 percent of his time is spent conducting post injury rehabilitation programs which include weight programs and exercise, and the remaining 15 percent of his time is spent performing miscellaneous associated duties.

The athletic trainer's primary duties do not meet the tests for exemption as an executive or an administrative employee. His duties and responsibilities clearly do not meet the requirements of sections 541.1(a) and 541.1(b) nor do they meet the requirements of sections 541.2(a)(1) or 541.2(a)(2).

Furthermore, it would appear that he would not qualify for exemption as a professional employee as his duties do not meet all the requirements stipulated in section 541.3 of the regulations. It is, for example, reasonably clear that he is not performing work involving the regular and continuing use of "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study . . .". Rather, as indicated by the job description, the minimum educational requirement consists only of on-the-job training.

Such nonexempt employees must be paid in accordance with the applicable minimum wage and overtime pay requirements. As we have previously indicated, however, the constitutionality of the provisions in the Act extending coverage to certain school and hospital employees of States and their political subdivisions is currently pending before the

Supreme Court of the United States in the case of the *State of Maryland, et al. v. W. Willard Wirtz.* The United States Department of Labor is currently restrained by court order from enforcing these provisions by any action in the courts against any State which is a party to this suit. Although the State of West Virginia is not a party to this suit, the Department of Labor is not in a position to proceed pending the court's decision in this issue.

CERTIFICATION

I hereby, certify, that Everett P. Jennings who signed the foregoing attestation, is now and was at the time of signing, Regional Administrator, Region VII, Wage - Hour Division, Employment Standards Administration, U.S. Department of Labor, and has legal custody of the official documents of the U.S. Department of Labor therein attested and that full faith and credit should be given to his act as such.

In witness whereof, I, Darlene A. Lorman, duly designated by the Secretary of Labor as Authentication Officer of the Department of Labor, have hereunto subscribed my name and caused the seal of the Department of Labor to be affixed this 3rd day of October, 1996.

/s/_____
Darlene A. Lorman
Regional Administrator
Office of the Assistant
Secretary for Administration
and Management
Room 850, 1100 Main Street
Kansas City, Missouri 64105

(Authentication Officer,
U.S. Department of Labor)

ATTESTATION

I, Everett P. Jennings, am the disclosure officer, as defined in Title 29 Code of Federal Regulations, Part 70.2 (c), having custody of the records of the Kansas City, Missouri Regional Office, Wage - Hour Division (hereinafter referred to as Wage-Hour), Employment Standards Administration, Region VII, United States Department of Labor, in that I am Regional Administrator, as designated in Title 29 Code of Federal Regulations, Part 70, Appendix A. I certify that the attached document described as follows:

> Wage-Hour opinion letter dated March 26, 1993 by Everett P. Jennings with the name and address of the requester deleted;

is a true and correct copy of the original document which is in my custody. Said document was prepared and/or compiled by the staff in my office in the regular course of business; further said document was prepared and/or compiled pursuant to statutory authority, to wit, the Fair Labor Standards Act 1938, as amended (29 U.S.C. § 201 et seq.).

October 3, 1996
Date

/s/_____
Everett P. Jennings
Regional Administrator
Wage - Hour Division
Employment Standards Administration
United States Department of Labor
700 City Center Square
1100 Main Street
Kansas City, Missouri 64105

Wage-Hour Opinion Letters on Athletic Trainers

March 26, 1993

Dear

This will respond to your letter of February 25, 1993 requesting our opinion as to whether athletic trainers would qualify as exempt professional employees under the Fair Labor Standards Act. For reasons explained in the following paragraphs, we do not believe that the athletic trainers described in your correspondence are bona-fide professional employees.

The requirements for exemption as a professional are set forth in 29 CFR 541.3. Assuming that the athletic trainers in question are paid a salary of at least $250 per month[1] as defined in 541.118, their exemption status would be tested under the exemption streamlined or short test criteria. Under the short test, the trainers, in addition to being paid at the $250 salary level, would have to satisfy two basic exemption tests which are set forth below:

1) The trainer must have a primary duty consisting of "work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes" and

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[1] Error in original letter, should be "week" instead of month

2) The primary duty must include work that requires the consistent exercise of discretion and judgment.

We do not believe that the athletic trainers are performing work which can be said to require knowledge of an advanced type in a recognized, field or science or learning. Our review of the NATABOC certification requirements indicate that one can attain certification by acquiring a college degree, attaining 1500 hours of athletic training experience under the supervision of an NATA certified athletic trainer and by passing a national certification examination. The academic requirements can be satisfied by the acquisition of at least one course in seven specific areas. There appears to be no requirement for a degree in any specialized field of learning or science and the athletic training/experience elements appear to be the predominant requirement for entry into the field and performance of the work. The regulations and the courts (see for example Dybach v. Florida Department of Corrections (11th Circuit, 9/30/91) equate the requirement for "advanced knowledge required by a prolonged course of study" as being tantamount to requiring a college degree and, in many cases, an advanced academic degree specifically in the field of work for which the exemption is sought. Similarly, the Wage and Hour administrator has on many occasions held that work which can be performed without a degree in a specialized field of intellectual study cannot be exempt professional work even if the field of work includes some with prolonged education or a degree in a recognized discipline. Given the predominantly generalized education and experience/apprenticeship requirements for certification and for performance of work as an athletic trainer, we are unable to conclude that they are preforming work that requires advanced knowledge acquired by prolonged academic

instruction in a recognized field or science of learning. Thus, we conclude that they are not within the scope of the professional exemption.

I hope that the above is responsive to your inquiry. Should you have any questions relative to the above, please contact Deputy Regional Administrator Ron Dean who can be reached at the above telephone number.

Sincerely,

Everett P. Jennings
Regional Administrator

Encl: Dybach v. Florida

Wage-Hour Opinion Letters on Athletic Trainers

Records Authentication Certificate

U.S. Department of Labor

HEREBY ATTEST, That the attached copy or copies of each document listed below is a true copy of a document in the official custody of the Department of Labor.

Letter dated August 24, 1998 concerning Section 13(a)(1) of the Fair Labor Standards Act to the positions of associate head coach, and assistant athletic trainer in the Athletic Department of an institution higher education.

Signature & Title	Agency and Office	Date
/s/_____ Official Enforcement Policy Fair Labor Standards Team	Wage and Hour Division, ESA	7/19/99

I HEREBY CERTIFY, That Daniel F. Sweeney who signed the foregoing attestation, is now and was at the time of signing (title) Director, Fair Labor Standards Team and has legal custody of the official records of the United States Department of Labor therein attested and that full faith and credit should be given to his/her act as such.

IN WITNESS WHEREOF, I Elsie S. Davis duly designated by the Secretary of Labor as Authentication Officer of the Department of Labor, have here-unto subscribed my name and caused the seal of the Department of Labor to be affixed this 21st day of July 1999.

/s/_____
Elsie S. Davis
Authentication Officer
Department of Labor

AUG 24 1998

Dear Mr.

This is in response to your request for an opinion as to the application of §13(a)(1) of the Fair Labor Standards Act (FLSA) to the positions of associate head coach, assistant coach, and assistant athletic trainer in the Athletic Department of an institution of higher education. You would also like to know if any of the positions might be considered as exempt teaching positions.

* * *

The assistant athletic trainers report to a head athletic trainer and assist that individual with sports programs by providing supervision, training, evaluation, care, treatment prevention, and rehabilitation. They are salaried employees with earnings ranging from $28,900 (ten-month schedule) to $43,500 (twelve-month schedule). Their duties include (1) recognizing injuries suffered by student athletes, counseling students regarding injury prevention and assisting in the immediate treatment of injuries and rehabilitation; (2) the maintenance of the athletic training room, preparing athletes for practices and games; (3) providing athletes with conditioning and strength training advice and nutritional counseling; (4) assisting students with setting up appointments with physicians, and (5) maintaining accurate rosters and other records regarding insurance, injuries, and treatments given to athletes. Assistant athletic trainers are required to have a bachelors degree, to be certified by the National Athletic Trainer's Association, to be registered with the New Jersey State Board of Medical Examiners, and to hold a current First Aid/CPR certification.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Regulations, 29 CFR Part 541 (copy enclosed). An employee may qualify for exemption if all of the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate section of the Regulations, are met.

An employee who is paid on a salary or fee basis of at least $250 per week may qualify for exemption as a bona fide executive employee if he or she regularly directs the work of at least two or more employees and his or her primary duty is management of the business, or a recognized department. A determination of whether an employee has management as the primary duty must be based on all the facts in a particular case. In the ordinary case, it may be taken as a rule of thumb that primary duty means the major part, or over 50 percent of the employee's time.

Furthermore, an employee may qualify for exemption as a bona fide professional employee if the employee's primary duty consists of the performance of work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education, and whose work requires the consistent exercise of discretion and judgment in its performance. (See §541.3 of the Regulations.)

With regard to the administrative exemption, the regulatory criteria require, in part, that the employee's primary duty consists of either the performance of office or nonmanual

work directly related to management policies or general business operations of the employer or the employer's customers (§541.2(a)(1)); or the performance of functions in the administration of an educational establishment in work related to the academic instruction or training carried on there (§54I.2(a)(2)), and require that the employee exercise discretion and independent judgment (§541.2(b)).

* * *

With regard to assistant athletic trainers, their duties and responsibilities clearly do not meet all the requirements for exemption under §541.1, §541.2 or §541.3 of the Regulations. These employees lack discretion and independent judgment in the performance of their work. The term "discretion and independent judgment" implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision, and with respect to matters of significance. (See §541.207 of the Regulations.) Based on the information provided, the athletic trainers are most likely to spend more than 50% of their time in nonexempt work.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect

to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that the above information is responsive to your inquiry. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy
Fair Labor Standards Team

Enclosure

APPENDIX I

Administrative Procedure Act Provisions

5 U.S.C. § 553(b)

§ 553. Rule making

* * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

* * *

§ 551(5). Definitions

For the purpose of this subchapter –

* * *

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

* * *